

**IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY**

SEAN DONAHUE,	:	
Requester	:	Luzerne County
	:	No. 2021-10346
v.	:	
	:	
	:	
LUZERNE COUNTY,	:	PA OOR: AP 2021-1361
Respondent	:	

**BRIEF IN SUPPORT OF MOTION FOR THE IMPOSITION OF  
SANCTION AGAINST LUZERNE COUNTY  
AND**

**IN SUPPORT OF MOTION FOR MANDAMUS AND MOTION  
FOR PEREMPTORY JUDGMENT ORDERING IMMEDIATE AND  
ABSOLUTE FULL COMPLIANCE WITH THE OORs AUGUST 27,  
2021 FINAL DETERMINATION IN THAT CASE**

The imposition of sanctions against the County is appropriate because the County acted in bad faith, because the Petitioner is entitled to a *writ of mandamus*, because a citizen should not have to go through this amount of trouble just to get copies of public records and because imposition of a deterrent is justified.

## **Statement of Procedural History:**

On June 12, 2021, the Petitioner submitted a Right to Know Request to Luzerne County that stated the following;

"RTK REQUEST to LUZERNE 2020/2021 Elections

3 messages

[From:] Sean Donahue Sat, Jun 12, 2021 at 8:07 AM

To: [Shannon.Crake-Lapsansky@luzernecounty.org](mailto:Shannon.Crake-Lapsansky@luzernecounty.org)

Dear Luzerne County Manager and/or Agency Open Records Officer,

Ramilda Crocamo is the county solicitor. She is not the attorney for the county Board of Elections, nor for the County Council. She cannot be because there is a conflict of interest. Therefore, any advice she gives the members of the Board of Elections or members of the County Council, or to the board and council themselves, is not privileged.

(1) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which my complaints and lawsuit or future lawsuits about my write-in votes not being counted during the 2020 Primary Election, 2020 General Election and 2021 Primary Election were discussed. Please do not exclude or redact any information. Please be certain include copies of all documents, emails, etc. that include legal advice being given by Ms. Crocamo to individual members of the Luzerne County Council and Election Board and to the board and council themselves regarding my complaints about write in votes.

(2) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between employees and officials of the Election Bureau in which my complaints and requests regarding my write-in votes were discussed and in which denying me services from the Election Bureau because I filed or intend to file a lawsuit about write-in votes not being counted and reported properly was discussed and/or mentioned.

(3) For the time period of January 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which Dominion voting machines, the county's contract with Dominion, Dominion employees and management and Dominion in general was discussed.

A filled in and electronically signed copy of the county's RTK request form is attached.

Respectfully,  
Sean M. Donahue [See Attachment 4 to this filing, p8]

[From:] Sean Donahue     Sat, Jun 12, 2021 at 8:18 AM  
To: Shannon.Crake-Lapsansky@luzernecounty.org

Please add item (4)

(4) For items (1) , (2) and (3), please also email to me copies of all emails, memos, documents, containing legal advice the Ms. Crocamo gave to the members of the Election Board, County Council or members thereof.”(See Attachment 4 to this filing, p8)

On June 19, 2021, the Petitioner followed up with the County.

"[From:] Sean Donahue Sat, Jun 19, 2021 at 2:04 PM  
To: Shannon.Crake-Lapsansky@luzernecounty.org,  
"Griffith Jr., Walter"<Walter.Griffith@luzernecounty.org> ,  
"Urban,Stephen J"<Stephen.Urban@luzernecounty.org> ,  
"Haas, Harry"<Harry.Haas@luzernecounty.org> , Luzerne  
County Council Members<LCCM@luzernecounty.org>

Dear Ms. Crake-Lapansky,

Please do not forget to respond to my RTK Request.  
I will, of course, appeal even if you do not respond. I  
have raised a very important issue that the county  
needs to address.

Respectfully,  
Sean M. Donahue" (See Attachment 4 to this filing, p9)

On June 21, 2021, the County responded to the request by  
asserting a 30 day extension.

"Re: [EXTERNAL]: RTK REQUEST to LUZERNE  
2020/2021 Elections  
1 message

[From:]Crake-Lapsansky,  
Shannon<Shannon.Crake-Lapsansky@luzernecounty.org  
> Mon, Jun 21, 2021 at 9:11 AM  
To: Sean Donahue <seandonahue630@gmail.com>

Mr. Donahue:

We require a 30 day extension to complete processing this right to know request.

Shannon Crake Lapsansky, Esq.  
Assistant Solicitor  
Luzerne County Office of Law" (See Attachment 4 to this filing p15)

Attached to the County's email was a backdated county form. (Attachment 4 p17) The County falsely alleged that it received the Petitioner's Right to Know request on June 11, 2021 and that it responded on June 18, 2021. However, the Petitioner did not submit his request until June 12, 2021 (Attachment 4 p8) and the County did not respond until June 21, 2021. (Attachment 4, p15)

In the filled in County form, the County claimed that a 30 day extension was necessary for two reasons;

Reason 1:

"\_\_\_x\_\_\_ (4) a legal review is necessary to determine whether the record is a record subject to access under this act"

Reason 2:

"\_\_\_X\_\_\_ (7) the extent or nature of the request precludes a response within the required time period."

On July 19, 2021, the County denied the Right to Know Request (Attachment 4 pp28-29), stating, *inter alia*, the following;

" Your request is denied for the following reasons, as permitted by Section 705 of the Act...

...

Section 705. Creation of record.

When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.

Luzerne County does not have any written records related to the subject to your request with the exception of Meeting Minutes from the County Council and Board of Elections meetings which are located on the Luzerne County website. ..." (Attachment 4 p29)

### **Statement of The Pertinent Facts:**

On June 12, 2021, the Petitioner submitted a Right to Know Request to Luzerne County.

On June 21, 2021, the County asserted its right to a 30 day extension to conduct a "good faith search" for responsive records and then claimed that it did not possess responsive records.

The County did not meet its burden to prove that it conducted a “good faith search”, that it does not possess or control responsive records or that responsive records do not exist. (65 P.S. §67.708; *Moore infra*; *Hodges infra*)

On August 27, 2021, the Pennsylvania Office of Open Records (OOR) ordered the County to produce responsive records. (See “Attachment A” to original petition)

The County did not appeal the OORs Final Determination.

The Petitioner filed his Petition for a *writ of mandamus* on October 15, 2021. The County received its copy on October 18, 2021. (See Attachments to Notice to the Court)

The Petitioner served an additional copy with a Notice to Defend on January 27, 2022.

The Petitioner is entitled to a writ of mandamus Per 42 Pa. C.S. § 5522(b)(1).

“(b) Commencement of action required. — The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office....”  
(id; See “Attachment B” to original petition)

The County has now had nearly six months to provide the responsive records or to produce evidence that the responsive records do not exist but the County has failed to do so.

In cases with similar facts, Pennsylvania Courts have imposed sanctions on the agencies for their failure to comply with the Pennsylvania Right to Know Law. (65 P.S. §67.1305(a); *Uniontown Newspapers v. PA DEPT OF CORRS*, 185 A.3d 1161, 1175, (Pa. Commw. Ct. 2018)

**65 P.S. §67.1305:**

“(a) Denial of access.--A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.

(b) Failure to comply with court order.--An agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than \$500 per day until the public records are provided.”

In the instant case, the OOR itself noted that this case warrants the imposition of sanction on the County (See n.1 at OOR Final Determination at “Attachment A” to the original petition, cited *infra* p22)



## **Statement of the Questions Involved:**

### **Question 1:**

DOES THE PETITIONER HAVE A CLEAR RIGHT TO MANDAMUS?

Suggested Answer: **Yes**

### **Question 2:**

DID LUZERNE COUNTY ACT IN BAD FAITH?

Suggested Answer: **Yes**

### **Question 3:**

IS THE IMPOSITION OF SANCTIONS WARRANTED IN THIS CASE?

Suggested Answer: **Yes**

## Argument in Support of Question 1:

The Supreme Court of Pennsylvania has opined;

"...Mandamus will only lie to compel official performance of a ministerial act or mandatory duty where **[Criteria 1]** there is a clear legal right in the plaintiff, **[Criteria 2]** a corresponding duty in the defendant, and **[Criteria 3]** a lack of any other adequate and appropriate remedy at law. Porter v. Bloomsburg State College, 450 Pa. 375, 301 A.2d 621 (1973); Valley Forge Racing Association v. State Horse Racing Commission, 449 Pa. 292, 297 A.2d 823 (1972). Further, this Court has stated that mandamus is proper to compel the performance of legal duties, even where the existence and scope of such duties must be found and defined in the course of the mandamus action itself. Volunteer Firemen's Relief Association v. Minehart, 415 Pa. 305, 203 A.2d 476 (1964)." (Delaware River Port Auth. v. Thornburgh, 493 A.2d 1351, 508 Pa. 11, 20, (1985))

The webpage of the Pennsylvania Office of Open Records (OOR) specifically instructs requesters who seek to enforce a Final Determination of the OOR against a local agency to pursue mandamus as a path to relief. The OOR webpage states the following;

**"If neither party appeals the OOR's Final Determination, it becomes a binding, enforceable order on the 31st day after the Final**

**Determination is mailed.** As of that date, if the agency has not provided documents as ordered by the OOR, the requester may seek to enforce the order in court. If the agency involved is a Commonwealth agency, the requester must file a petition to enforce pursuant to Pa. R.A.P. 3761(b), *Enforcement of Final Determinations of the Office of Open Records*, available at [http://www.pacodeandbulletin.gov/secure/pacode/data/210/chapter37/210\\_0037.pdf](http://www.pacodeandbulletin.gov/secure/pacode/data/210/chapter37/210_0037.pdf). If the agency involved is a local agency, the requester may file an action in mandamus or other petition as authorized by any local rule of court. *Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601 (Pa. Commw. Ct. 2017). (See Attachment 1 to this filing; Also see "Attachment C" to the original petition)

In the instant case, the Petition for a *writ of mandamus* was filed in a timely manner.

"....Section 5522(b) of the Judicial Code provides a six-month statute of limitations for actions sounding in mandamus. It states:

(b) Commencement of action required. — The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office....

42 Pa. C.S. § 5522(b)(1). ... Here, [Petitioner] filed his "petition..." well within six months of the issuance of the final determination by the Office of Open Records.

[The Petition]....pleads the essential factual prerequisites of mandamus." ( *Capinski supra* p610; Also see "Attachment B" to the original petition)

On August 27, 2021, the OOR issued its final determination in the instant case at PA OOR *Docket No: AP 2021-1361*. The OOR Final Determination read;

"...the appeal is granted, and **the County is required** to provide all responsive records 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 or petition for review to the Luzerne County Court of Common Pleas. 65 P.S. § 67.1302(a)." (*Donahue v. Luzerne, Docket No: AP 2021-1361, August 27, 2021, PA OOR*; See Copy of Final Determination Attached to original petition at "Attachment A" to that petition)

Just as in *Capinski*, neither side in the instant case appealed the Final Determination of the OOR.

".....In sum, mandamus is the action to file where the requester has not appealed the final determination to a court for a merits review and seeks compliance with a final determination of the Office of Open Records. *Uniontown* did not otherwise hold...

**...Here, neither party appealed the final determinations of the Office of Open Records.** Had either party done so, enforcement could have been

presented to the court deciding the appeal. Where a trial court has decided an appeal of a final determination of the Office of Open Records, it may enforce its order as a matter of pendant jurisdiction. *Staub v. City of Wilkes-Barre*, 2013 WL 5520705 (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013). Likewise, the Commonwealth Court may enforce its order as a matter of ancillary jurisdiction whenever it hears an appeal of an agency's adjudication. *Lindberg*, \*610 503 Pa. 423, 469 A.2d 1012. Neither scenario is presented here....." (*Capinski supra* pp609-610)

Just as in *Roddy infra*, *Legrere infra* and *Bagwell infra*, the County cannot raise any reasons whatsoever to justify not producing the responsive records. The County must produce the responsive records and incur sanctions for its having failed to do so.

"In both *Legere* and *Bagwell*, the agencies were not permitted to raise privileges or exemptions that had not been raised before the initial fact-finder. While *Legere* and *Bagwell* involved appeals of final decisions of the OOR challenging the merits of the OOR's decisions, the Office here did not appeal the decision of the OOR. That does not alter the application of this principle for the following reasons. Given the limited scope of enforcement proceedings, this Court must enforce the unappealed OOR Final Determination, which did not provide for any redactions of the Requested Records. It is only through an appeal of an OOR final determination to this Court that a party can litigate the merits of the determination, including any redactions and privileges

presented to the OOR.” (*Dennis Roddy v. Pennsylvania Office of the Governor*, No. 561 M.D. 2020, (Pa. Cmwlth. 2020), at “Attachment D” to the original petition; *Department of Environmental Protection v. Legere*, 50 A.3d 260 (Pa. Cmwlth. 2012); *Pennsylvania Department of Education v. Bagwell*, 131 A.3d 638 (Pa. Cmwlth. 2016))

In the instant case, the Final Determination of the OOR became enforceable on September 27, 2021.

On October 14, 2021, the Petitioner informed the County Solicitor that he would file a Petition for a *writ of mandamus*.

**“FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR  
Dkt. AP 2021-1361**  
11 messages

...

Sean Donahue Thu, Oct 14, 2021 at 4:25 PM  
To: Shannon.Crake-Lapsansky@luzernecounty.org,  
Luzerne County Council Members  
<LCCM@luzernecounty.org>

Dear Ms. Crake-Lapsansky,

Please be advised that I am going to petition for mandamus relief in the RTKL case listed in the subject line. (Copy of Final Determination at OOR AP 2021-1361 is attached)

Please also be advised that I am going to request a peremptory judgement that Luzerne County's obligation to comply with the Final Determination is absolute.

Respectfully,

Sean M. Donahue” (See Attachment 2 to this filing;  
Also see “Attachment E” to the original petition)

The Petition in the instant case was filed on October 18,  
2021. (See datestamp on the original petition files at Luzerne No.  
2021-10346)

On January 27, 2022, the County Solicitor’s office confirmed  
that it is aware of the instant case.

**“Re: [EXTERNAL]: Fwd: FINAL DETERMINATION - Donahue  
v. Luzerne Co. - OOR Dkt. AP 2021-1361  
1 message**

Dennis, Laura Thu, Jan 27, 2022 at 11:48 AM  
To: Sean Donahue

The Office of Law will be representing the County. If  
you have any questions or concerns, you may email  
me.

Thank you,  
Laura Dennis” (Attachment 3 to this filing)

Also on January 27, 2022, a second copy of the original  
petition, with a Notice to Defend, was served to the County  
Solicitor. Copies were sent to the OOR and to chambers. A copy  
was filed electronically with the Court.

In the instant case, all three of the requirements to justify a *writ of mandamus* have been met. Per *Capinski supra*, the Plaintiff DOES HAVE a clear right to mandamus. In *Capinski*, the Commonwealth Court wrote;

"The Right-to-Know Law imposes a **mandatory and ministerial duty [Criteria 1]** upon a government agency to provide public records to a requester. Where there has been a final determination of the Office of Open Records that the requested records are disclosable, then the requester has established a clear right **[Criteria 2]** to have the agency produce those public records. The requester lacks another adequate and appropriate remedy **[Criteria 3]** because the Right-to-Know Law does not provide one." (*Capinski* p606; See *Delaware River supra* p20 cited *ante* p10)

In *Willcox infra*, the Supreme Court of Pennsylvania opined;

"This lack of an efficient legal remedy is, in effect, the negation of a legal right. Not only is the maxim "ubi jus ibi remedium" — where there is a right there is a remedy — one of the proudest declarations of the common law, but it necessarily implies that a right without a remedy is not a right at all but a mere abstraction. \*601 It was said by HOLT, C. J., in *Ashby v. White*, 2 Ld. Raym. 938, 953, that "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."" (*Willcox v. Penn Mutual Life Insurance Company*, 357 Pa. 581, 600-601, 55 A.2d 521, 530-31 (1947))



"10. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court of the United States wrote.

'3. He is entitled to the remedy for which he applies. This depends on:

1. The nature of the writ applied for, and
2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be

"a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions requiring them to do some particular thing therein specified which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrows, 1266, in the case of *The King v. Baker et al.*, states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge,

"there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to

assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government."

In the same case, he says,

"this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone,

"to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice.

Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed, and the person applying for it must be without any other specific and legal remedy.' (id Page 5 U.S. 169)" (See original petition, ¶10 at pp9-11)

The Petitioner avers that his entitlement to a *writ of mandamus* in the instant case is *beyond cavil*.

## **Argument in Support of Question 2:**

### **Act of Bad Faith 1:**

Luzerne County engaged in bad faith by not complying with the requirements of the RTKL. In *Uniontown supra*, the Commonwealth Court stated the following;

"In the RTKL context, "bad faith" does not require a showing of fraud or corruption. **The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith.** Phila. DA (affirming trial court's award of \$500 civil penalty for bad faith); Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder

could discern bad faith); *Staub v. City of Wilkes-Barre & LAG Towing, Inc.* (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013), 2013 WL 5520705 (unreported) (affirming attorney fee award for agency failure to confer with contractor before responding to request). The RTKL reserves bad faith determinations for disposition by Chapter 13 Courts. *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453 (2013)." (*Uniontown supra p1170*)

On August 27, 2021, the OOR ordered Luzerne County to provide the Petitioner with copies of public records. (See "Attachment A" to the original petition, cited *ante* p12) The County never provided the records. Therefore, the County acted in bad faith. (*Uniontown supra*)

## **Act of Bad Faith 2:**

The county also engaged in bad faith by averring that the requested records do not exist but failing to provide proof of nonexistence.

In *Hodges infra*, the Commonwealth Court stated the following;

"The burden of proving a record does not exist, or is exempt from disclosure, is placed on the agency

responding to the right-to-know request. See 65 P.S. § 67.708. This Court has stated that an agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record. Moore v. Office of Open Records, 992 A.2d 907, 908-909 (Pa. Cmwlth.2010)." (Hodges v. Pa. Dep't of Health, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) )

In *Moore infra*, the Commonwealth Court stated the following;

"The Department searched its records and submitted both sworn and unsworn affidavits that it was not in possession of Moore's judgment of sentence—that such a record does not currently exist. These statements are enough to satisfy the Department's burden of demonstrating the non-existence of the record in question, and obviously the Department cannot grant access to a record that does not exist.<sup>11</sup> Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied Moore's appeal." (Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth.2010))

In the instant case, the County averred on July 19, 2021 that;

"Luzerne County does not have any written records related to the subject to your request with the

exception of Meeting Minutes from the County Council and Board of Elections meetings which are located on the Luzerne County website.” (Attachment 4 to this filing)

However, the County never attempted to meet its burden of proof on this matter and on August 27, 2021, the OOR determined the following;

“Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). **In the present case, the County did not comply with the RTKL by providing any factual or legal support for its assertion that the requested records do not exist.** [n.1] Based on the County’s failure to provide any evidentiary basis in support of its claim that responsive records do not exist or that the records are exempt under the RTKL, the County did not meet its burden of proof under the RTKL. 65 P.S. § 67.305.

•••

[n.1] See generally 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith”). ” (“Attachment A” to the original petition, p2)

Because "*the County did not comply with the RTKL by providing any factual or legal support for its assertion that the requested records do not exist*", the County acted in bad faith. (*Uniontown supra*)

### **Act of Bad Faith 3:**

The County engaged in bad faith by not conducting a "good faith" search for records in the County's own computers systems and legal files. In *Uniontown supra*, the Commonwealth Court stated the following;

"Chapter 9 of the RTKL sets forth an agency's mandatory duties during the request stage. 65 P.S. §§ 67.901-.905. Section 901 of the RTKL

mandate[s] that [u]pon receipt of a written request for access to a record, an agency shall make a *good faith* effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has

possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.' 65 P.S. § 67.901.

Phila. DA, 155 A.3d at 1130 (italics in original; bold and underline added).

Upon receipt of a request, an open records officer "must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency." Breslin v. Dickinson Twp., 68 A.3d 49, 54 (Pa. Cmwlth. 2013) (citing Barkeyville Borough, 35 A.3d at 96). Section 901 also includes the duty to perform a reasonable search for records in good faith. Dep't of Labor & Indus. v. Earley, 126 A.3d 355 (Pa. Cmwlth. 2015). As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the \*1172 request, and to obtain all potentially responsive records from those in possession. Breslin." (*Uniontown supra pp1171-1172*)

Because the County never provided affidavits attesting that it conducted such a "good faith search", (*Hodges supra; Moore supra*) the County did not comply with RTKL ("Attachment A" to the original petition). Therefore, the County acted in bad faith. (*Uniontown supra p1170; cited ante p12*)

#### **Act of Bad Faith 4:**



The County engaged in bad faith by not conducting a “good faith” search of recorded videos of closed meetings and work sessions, that included attorneys from the county solicitor’s office (and/or office of law) and the Election Board members, during which the County Solicitor and the Election Board members discussed the matters related to the Right to Know Request in the instant case.

In *Barkeyville infra*, the Commonwealth Court stated the following;

“‘Record’ is expressly defined in the RTKL, 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 date-processed or image-processed document.

Section 102 of the RTKL, 65 P.S. § 67.102. (Emphasis added.) This definition contains two parts. First, the information must “document a transaction or activity of the agency.” Recently, this Court, in *Second Chance*, interpreted “documents” to mean “proves, supports [or] evidences.” *Second Chance*, 13 A.3d at 1034-35; *Bari*, 20 A.3d at 641. Second, the information must be “created, received, or retained” in connection with the

activity of the agency." (*Barkeyville Borough v. Stearns*, 35 A.3d 91, 95, (Pa. Cmwlth. 2012))

Because the County never provided affidavits attesting that it conducted a "good faith search",(*Hodges supra; Moore supra*) of the videos of the closed meetings that explicitly addressed the subject matter that is addressed in the Right to Know Request in this case, the County did not comply with the RTKL. Therefore, the County acted in bad faith.

#### **Act of Bad Faith 5:**

The County engaged in bad faith by not conducting a "good faith" search for records in the email accounts of the members of the Luzerne County Election Board. In *Uniontown supra*, the Commonwealth Court stated the following;

"When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors. Breslin; Staub. Under Section 506(d) of the RTKL, 65 P.S. § 67.506(d), "the agency is required to take reasonable steps to secure the records from the [contractor] and then make a determination if those records are exempt from disclosure." Staub, slip op. at 6, 2013 WL 5520705 at \*2." (*Uniontown supra* p1172)

In *Barkeyville supra*, the Commonwealth Court stated the following;

".... In making its determination, OOR concluded that the "physical possession" of a record is not the litmus test of any agency performing its duties of disclosure, rather the test is one of control. (*Id.*) OOR concluded that the emails reflecting Council business that are in the possession of individual Council members and located on their personal computers are within the Borough's control. (*Id.*) Moreover, **OOR determined that a lack of response from individual Council members was insufficient evidence to deduce that emails did not exist and ordered the Borough to turn over any remaining emails relating to Borough business.** (*Id.*) ... [Barkeyville p93]...

...

....Finally, Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), provides:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, *shall be considered a public record of the agency* for purposes of this act..... [Barkeyville p94]...

...

...Here, ... emails ... between [Election Board] member[and the County Solicitor's office and/or Office of Law].... meet the second part of Section 102

because ...emails ..."created" by [Election Board] members, in connection with their positions as public officials... meet the definition of "record" found in Section 102 of the RTKL....[Barkeyville p95]...

...

...Our Supreme Court has stated that "a public entity's lack of possession of an existing writing at the time of the request pursuant to the RTKL is not, by itself, determinative of the question of whether the writing is a public record subject to disclosure." Tribune-Review Publ'g Co. v. Westmoreland Cnty. Housing Auth., 574 Pa. 661, 671, 833 A.2d 112, 118 (2003). The true inquiry is whether the document is subject to the control of the agency. *Id.* In other words, constructive possession qualifies as possession under the RTKL to presume that a record is a *public* record based on Section 305....[Barkeyville p96]" (*Barkeyville supra*)

Because the County never provided affidavits attesting that it conducted a "good faith search",(*Hodges supra; Moore supra*) of the email accounts of the Election Board members, the County did not comply with RTKL ("Attachment A" to the original petition). Therefore, the County acted in bad faith. (*Uniontown supra p1170; cited ante p12*)

#### **Act of Bad Faith 6:**

The County engaged in bad faith by averring that it does not possess records that are responsive to the Right to Know request in the instant case, when the evidence in this case, clearly proves that it is more probable than not that responsive records do exist.

On July 19, 2021, the Petitioner sought the assistance of the County Council to get copies of the records.

"Election Board RTK Request of July 2021  
1 message

[From:]Sean Donahue Mon, Jul 19, 2021 at 10:30 AM  
To: "Urban, Stephen J"  
<Stephen.Urban@luzernecounty.org>, "Griffith Jr.,  
Walter" <Walter.Griffith@luzernecounty.org>

Dear Stephen J and Walter,

It is my position that the county solicitor does not represent the election board and that his/her legal advice is not privileged precisely because the solicitor's office does not represent the election board. However, on many occasions, when I asked questions at public meetings, they claimed to be under the advisement of Ms. Romilda Crocamo not to answer or reply to my comments and questions.

Today, the solicitor's office claims that there is no written record, electronic or otherwise, of Ms. Crocamo or the solicitor's office giving legal advice to the

election board, nor is there any such record, such as email, of the election board asking the solicitor's office. i.e., Ms. Crocamo, for legal advice. Yet, we know that consecutive election boards repeatedly turned to her for legal advice.

Are you aware of any emails, memos or written records, in which, the solicitor's office gave legal advice to the election board and, likewise, comparable records of the election board seeking such advice from Ms. Carocamo and the solicitor's office, rather than seeking advice from their own solicitor, Mr. Butera?

Respectfully,  
Sean" (Attachment 4 p30)

On July 19, 2021, County Council Member Walter Griffith responded by stating the following;

"Re: [EXTERNAL]: Election Board RTK Request of July 2021  
2 messages

[From:]Griffith Jr., Walter Mon, Jul 19, 2021 at 10:42 AM  
To: Sean Donahue,  
"Urban, Stephen J"  
<Stephen.Urban@luzernecounty.org>

Sean  
You need to go back and listen to the recordings.

Particularly the one where Stephen Urban was appointed to be chairman and you will see clearly that the office of law did give legal advice. That's one very

apparent situation And there are several others if you go back and listen to the recordings

Walter L Griffith JR  
Luzerne County Council  
"A Voice for the People" " (Attachment 5 to this filing)

The "LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATIONS MEETING MINUTES JUNE 16, 2021" (See Attachment 6, pp4-8) contains substantial evidence of the likely exchange of written paper and electronic communications between different County entities that constituted the creation of records that are responsive to the Right to Know Request in the instant case.

"Sean Donahue-echo scattering concerns; should not scatter and should not certify. Wants to know why the Board directed the Bureau not to discuss his votes with him. Romilda Crocamoadvised Board not to respond because of his notice to file a petition. S.D. Sees a conflict in the Office of Law advising the Board; do not certify the election because of scattering.

Walter Griffith-wants to see a precinct by precinct count; these are public records, if they are public documents people have a right to see them (Sect 308). Thinks the Office of Law is not giving correct advice. Happy Face Book page is being addressed. The Board's county web page also needs attention [Attachment 6 pp4-5].....

...

....Sean Donahue-Get rid of Face Book which is free; doesn't want to spend money on a web page. Paper ballots worked well for his grandfather;. Says someone on the Board smirks. The Board and Bureau have worked together when the past elections have been screwed up. He suggests we go to the courts for problem solving-set up an election court to avoid having to file under the election code . Presidential judge can set this up. Pointed out that in some races one vote counted and in others 5 votes were scattered.

Mark Rabo, Hazleton-Bewildered about something said about the directives-Office of Law only gives opinions on legal matters. The Board was asked if they had the time to serve; it's easy to read the election code. If directives over rule the charter or state constitution that is a problem.. Read the election laws and apply them. Drop box pulled 1 PM; too early. Rick Nardone-because we us Office of Law as a resource doesn't mean we rely on them for the decision. Denise Williams-did not ask Office of Law for guidance on the directives. " (Attachment 6, p8)

The "LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATIONS SPECIAL MEETING MINUTES JUNE 7 2021" (Attachment 6 pp34-36) contains substantial evidence of the likely exchange of written paper and electronic communications between different County entities that constituted the creation of



records that are responsive to the Right to Know Request in the instant case.

"Sean Donahue-did Dominion machine show his name? Wants to know why his name didn't appear; he wrote his name in for all offices; not the Board's place to not record his name; he is legally able to vote for himself; (advised by Chair that comment should be on agenda item) don't certify the election.[Attachment 6 p35].....

...

Sean Donahue-Mr. D says he as far as he knows he was to only one to write in his name for for some offices. (Romilda Crocamo advised the Board not to respond due to pending litigation.) What determines scattered? Why are some votes counted and others not? Clarify the criteria. Feels he is being forced to file a lawsuit; has a constitutional right to vote for himself for Supreme Court Justice. Says if this is clarified it will prevent a lawsuit and opens up other avenues like Council for a change of procedure..."(Attachment 6, pp35-36)

The "LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATION SPECIAL MEETING MINUTES JUNE 4, 2021" (Attachment 6 pp31-33) contains substantial evidence of the likely exchange of written paper and electronic communications between different County entities that constituted the creation of

records that are responsive to the Right to Know Request in the instant case.

"Sean Donahue, Larksville-Is the complaint system in place? People want to know who the write ins were. He wants a policy meeting so that if he doesn't agree he can go to county council for an ordinance. Why aren't the results posted a week ahead of time?..."  
(Attachment 6 p32)

The "LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATIONS SPECIAL MEETING MINUTES May 24, 2021" (Attachment 6 pp24-30) contains substantial evidence of the likely exchange of written paper and electronic communications between different County entities that constituted the creation of records that are responsive to the Right to Know Request in the instant case.

"Sean Donahue-Dave Parsnik assured us that write ins will be counted but we are scattering. We need a referendum question to go to paper ballots. Wants to know the interest of the person that did the clerical error. Was it done on purpose?..." (Attachment 6 p28)

### **Argument in Support of Question 3:**

Sanctions are warranted in the instant case because the County has had nearly six months to correct its own errors. However, rather than do the right thing and take the actions necessary to correct those errors, the County instead decided to wait and hope that the statute of limitations would run on the Petitioner being able to successfully navigate the courts to Petition for relief. The failure of the County to take corrective action over the past six months is further evidence that the County "*willfully or with wanton disregard deprived the requester of access to a public record*". (See "Attachment A" to original petition, n.1 to OOR Final Determination; cited *ante* p22)

The Petitioner avers that the instant case evidences behavior by the Luzerne County government that is at least as "*willful*[]" [and] *with* [as much] *wanton disregard*" as that which was found in *Uniontown supra*.

In *Uniontown*, the Commonwealth Court found the following;

## **"2. Sanctions**

... Section 1305(a) provides: "A court may impose a civil penalty of not more than \$1,500 if an agency

denied access to a public record in bad faith." Id. (emphasis added).

"[T]he purpose of Section 1305 of the RTKL is . . . to penalize conduct of [an] agency and to provide a deterrent in the form of a monetary penalty in order to prevent acts taken in bad faith in the future." Phila. DA, 155 A.3d at 1141 (affirming \$500 penalty). "Section 1305 of the RTKL is directed wholly to the agency charged with a mandatory duty under the RTKL to provide requesters access to public records within the agency's custody and control." Id. at 1140.

The RTKL vests Chapter 13 Courts with jurisdiction to assess whether an "agency withheld requested records willfully, wantonly, or unreasonably." Bowling, 75 A.3d at 470. ...

The current record supports civil penalties. Because the statute caps the penalty amount, and there is evidence demonstrating ... bad faith, it is unnecessary to hold a hearing as to the amount of penalties. Phila. DA.

Here, the maximum statutory civil penalty is warranted based on ... noncompliance throughout the RTKL process, as described above. The amount corresponds to the degree of noncompliance, and the repercussions of that noncompliance.

The evidence shows [that the County] did not conduct a thorough search for responsive records....The duration that DOC withheld public records also weighs in favor of imposing the maximum civil penalty." (*Uniontown supra p1175*)

The evidence in the instant case proves that the County's behavior is similar to bad faith the behavior evidenced in *Bielby infra*. (Attachment 7)

"Bielby submitted a Right-to-Know Law<sup>[6]</sup> Request to the City's Law Department and became aware of Appellants' *ex parte* communications with the Streets Department and the Deputy Commissioner. On June 12, 2019, Bielby filed the Motion. On August 14, 2019, the trial court held a hearing, and granted Bielby's request for sanctions. The trial court directed Appellants to pay all costs and fees associated with the Motion in the amount of \$1,500.00 and a \$15,528.51 sanction for the additional costs Bielby incurred to third-party professionals as a result of Appellants' conduct."<sup>1</sup> (*BIELBY v. ZONING BOARD OF ADJUSTMENT OF CITY OF PHILADELPHIA*, No. 1441 CD 2019, ¶5, (Pa. Commw. Ct. Apr. 9, 2021))

The behavior of the County evidenced in the instant case is similar to that evidenced in *California Uni of PA v. Bradshaw*, No. 1491 C.D. 2018, (Pa. Commw. Ct. October 13, 2021).

(Attachment 8 to this filing)

"...On October 15, 2018, OOR issued its final determination (Final Determination), granting Respondent's appeal. Concluding that the University abandoned its argument that it did not possess the

requested records, ... OOR thus determined that, having failed to demonstrate that the requested records were exempt from disclosure, the University was required to provide Respondent with all records that were responsive to the request...[*California supra* Attachment 8 p3]...

...shortly after the Supreme Court denied the University's petition for allowance of appeal, Respondent submitted an inquiry to the University concerning production of the requested records. ...On December 3, 2019, the University sent a written response and related documentation to Respondent indicating that it sought responsive records from the Foundation following the Supreme Court's denial of allocatur and that the Foundation notified the University that no such records existed...[*California supra* Attachment 8, pp5-6]...

...the Court agrees...the University was required to determine whether potentially responsive records existed at the ...third-party ... prior to issuing its denial of Respondent's original RTKL request. As noted, the University ...failed to make such an initial inquiry. ...Indeed, this case demonstrates precisely why it is axiomatic that an agency fulfill its initial duties under the RTKL in searching for potentially responsive records as outlined above:...[*California supra*, "Attachment 8", p14]...

...Turning to the University's grounds for denial, the Court observes that, in asserting its first basis for denying the request that it did not possess ... records—... notwithstanding that the University does not actually possess responsive records ....any such records would be considered "public records"... As such, the University's first grounds for denial was "not based on a reasonable interpretation of law" [because

the County failed to proffer the affidavits necessary to prove the nonexistence of responsive records]...[Attachment 8 pp 15-16]...

In sum, the Court concludes that the University engaged in bad faith ... in denying Respondent's RTKL request without first determining whether the [Election Board members] had potentially responsive records in [their] possession...[*California supra* Attachment 8, p17]...

..Respondent also seeks the maximum \$1,500 allowed in statutory damages under Section 1305 of the RTKL. .... in view of the University's bad faith...the Court finds the supported amounts to constitute an appropriate award....[is]\$1,500 in statutory damages under Section 1305 of the RTKL [*California supra* Attachment 8, pp17-18]... " (See Copy of *California supra* at Attachment 8)

### **Conclusion**

The Petitioner avers that he has proven that is entitled to a *writ of mandamus* ordering the County to comply with the OORs Final Determination of August 27, 2021. The Petitioner further avers that he has proven both that the County repeatedly acted in bad faith and that the imposition of sanction on the County is appropriate. The Petitioner recognizes that he filed this Petition *IFP* and that given his *IFP* status, the Court may prefer to impose

only nominal sanctions. The Petitioner avers that, given that it was the Solicitor's officer itself that acted in bad faith, the imposition of, at least, nominal sanctions and entry of a judgment that the County acted in bad faith is appropriate.

The foregoing document is true in both fact and belief and submitted under penalty of perjury under 18 Pa. C.S. §4904.

Respectfully Submitted,

Jan 31, 2022  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
Sean M. Donahue  
625 Cleveland Street  
Hazleton, PA 18201  
570-454-5367  
seandonahue630@gmail.com



**JUDGE'S CHAMBERS**  
PENN PLACE, SUITE 307  
20 NORTH PENNSYLVANIA AVENUE  
WILKES-BARRE, PA  
18702

(570) 408-8190  
Fax (570) 825-1569



**RICHARD M. HUGHES, III**  
JUDGE

Sean Donahue  
625 Cleveland Street  
Hazleton, PA 18201

Laura Dennis, Esquire  
Luzerne County Office of Law  
200 North River Street  
Wilkes-Barre, PA 18702

**Re: Donahue v. Luzerne County**

**No. 10346 of 2021**

January 6, 2022

Dear Counsel:

**Oral Argument** in the above-captioned matter on the Petition for a Writ of Mandamus in a Right to Know Case and Motion for Peremptory Judgment Ordering Immediate and Absolute Full Compliance with the OORs August 27, 2021 Final Determination in the Case (filed October 18, 2021) has been scheduled for **February 7, 2021 at 9:00 A.M.** at the Luzerne County Courthouse, 200 North River Street, Wilkes-Barre, PA.

Please direct any questions to myself or His Honor's executive secretary, Nicole Marek at (570) 408-8190, or email me at [zach.watkins@luzernecounty.org](mailto:zach.watkins@luzernecounty.org).

Very respectfully,

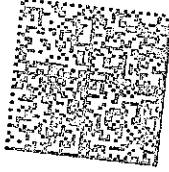
A handwritten signature in cursive script, appearing to read "Zach J. Watkins".

Zachary J. Watkins, Esquire  
Law Clerk to the Honorable Richard M. Hughes, III

JUDGE'S CHAMBERS  
PENN PLACE, SUITE 307  
20 N. PENNSYLVANIA AVENUE  
WILKES-BARRE, PA 18702  
RICHARD M. HUGHES, III  
JUDGE

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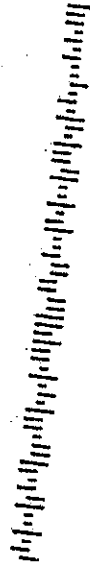
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Sean Donahue  
625 Cleveland Street  
Hazleton, PA 18201

LAHMSNM 18201



# Attachment 1


**OOR**

Office of Open Records

## POST-FINAL DETERMINATION

You have received a Final Determination from one of the OOR's Appeals Officers. What happens next?

**If either party disagrees with the OOR's Final Determination, they may appeal to the appellate court with jurisdiction over the matter.** Appeals of decisions involving Commonwealth, judicial, or legislative agencies are heard by the Commonwealth Court. Appeals of decisions involving local agencies are heard by the court of common pleas where the local agency is located. Appeals of an OOR Final Determination must be filed within thirty (30) days of the mailing date of the Final Determination. An appeal stays the release of records until the court decides the matter.

**The OOR also accepts Petitions for Reconsideration, subject to 1 Pa. Code § 35.241.** Petitions for Reconsideration must be filed within fifteen (15) days of the mailing date of the Final Determination and must concisely state the alleged errors in the Final Determination. Petitions for Reconsideration shall be directed to the OOR's Chief Counsel. The OOR is unable to accept any new evidence on reconsideration. A Petition for Reconsideration will be deemed denied if no response is made by the OOR within 30 day after it is filed. Please refer to 1 Pa. Code § 35.241 to determine what effect filing a Petition for Reconsideration may have on your ability to also appeal to an appellate court.

**If neither party appeals the OOR's Final Determination, it becomes a binding, enforceable order on the 31st day after the Final Determination is mailed.** As of that date, if the agency has not provided documents as ordered by the OOR, the requester may seek to enforce the order in court. If the agency involved is a Commonwealth agency, the requester must file a petition to enforce pursuant to Pa. R.A.P. 3761(b), Enforcement of Final Determinations of the Office of Open Records, available at [http://www.pacodeandbulletin.gov/secure/pacode/data/210/chapter37/210\\_0037.pdf](http://www.pacodeandbulletin.gov/secure/pacode/data/210/chapter37/210_0037.pdf). If the agency involved is a local agency, the requester may file an action in mandamus or other petition as authorized by any local rule of court. *Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601 (Pa. Commw. Ct. 2017);

If you have questions about any of the above courses of action, you should seek the advice of legal counsel. The Pennsylvania Bar Association has a Lawyer Referral Service that can help you find an attorney: <https://www.pabar.org/site/For-the-Public/Find-a-Lawyer>. The OOR is unable to provide you any legal advice with how to proceed. As the quasi-judicial tribunal that adjudicated the matter and issued a Final Determination, the OOR is not a proper party to any appellate action.

## Attachment 1

## Attachment 2



Sean Donahue &lt;seandonahue630@gmail.com&gt;

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**FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361**

11 messages

**Isenberg, Kelly** <kisenberg@pa.gov>

Fri, Aug 27, 2021 at 9:11 AM

To: Sean Donahue &lt;seandonahue630@gmail.com&gt;, "Dennis, Laura" &lt;Laura.Dennis@luzernecounty.org&gt;

Dear parties,

Attached please find the final determination in the above-captioned appeal.

Thank you for your attention to this matter.

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

# Attachment 2

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 **2021-1361\_Donahue\_LuzerneCo\_FD.pdf**  
90K

Sean Donahue &lt;seandonahue630@gmail.com&gt;

Tue, Aug 31, 2021 at 9:29 PM

To: "Griffith Jr., Walter" <Walter.Griffith@luzernecounty.org>, "Urban, Stephen J" <Stephen.Urban@luzernecounty.org>

Will the County Council be ordering the county, via ordinance, to provide the records that OOR has ordered it to release?  
[Quoted text hidden]

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 **2021-1361\_Donahue\_LuzerneCo\_FD.pdf**  
90K

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**Sean Donahue** <seandonahue630@gmail.com> Thu, Oct 14, 2021 at 4:25 PM  
To: Shannon.Crake-Lapsansky@luzernecounty.org, Luzerne County Council Members <LCCM@luzernecounty.org>


Dear Ms. Crake-Lapsansky,

Please be advised that I am going to petition for mandamus relief in the RTKL case listed in the subject line. (Copy of Final Determination at OOR AP 2021-1361 is attached)

Please also be advised that I am going to request a peremptory judgement that Luzerne County's obligation to comply with the Final Determination is absolute.

Respectfully,  
Sean M. Donahue  
[Quoted text hidden]

---

 **2021-1361\_Donahue\_LuzerneCo\_FD.pdf**  
90K

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**Sean Donahue** <seandonahue630@gmail.com>  
To: "Isenberg, Kelly" <kisenberg@pa.gov>

Mon, Dec 27, 2021 at 1:02 AM

Dear Mr. Isenberg,

Please look into why the certified record was not transferred to the Luzerne County Court of CommonPleas for the appeal of AP 2021-1361. The Luzerne Docket No. is 2021 10346.  
[Quoted text hidden]

---

 **2021-1361\_Donahue\_LuzerneCo\_FD.pdf**  
90K

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**Sean Donahue** <seandonahue630@gmail.com>  
To: "Isenberg, Kelly" <kisenberg@pa.gov>, Shannon.Crake-Lapsansky@luzernecounty.org

Wed, Jan 26, 2022 at 5:18 PM

Mr. Isenberg,

Why hasn't the OOR filed the original record with the Pronotary of the Luzerne County Court regarding this matter?

Respectfully,  
Sean M. Donahue

 **BRW8CC84B7242D6\_001426.pdf**

[Quoted text hidden]

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**Sean Donahue** <seandonahue630@gmail.com>  
To: "Isenberg, Kelly" <kisenberg@pa.gov>, "Dennis, Laura" <Laura.Dennis@luzernecounty.org>

Wed, Jan 26, 2022 at 5:19 PM

[Quoted text hidden]

---

**Sean Donahue** <seandonahue630@gmail.com>  
To: "Dennis, Laura" <Laura.Dennis@luzernecounty.org>

Wed, Jan 26, 2022 at 8:59 PM

Dear Ms. Dennis,

You have not yet entered your appearance at Luzerne 2021-10346.

Will you be entering your appearance?

[Quoted text hidden]

---

**Sean Donahue** <seandonahue630@gmail.com>  
To: ewagensell@pa.gov

Thu, Jan 27, 2022 at 8:02 AM

Dear Ms. Wagensnell,

Please look into this.

Respectfully,  
Sean M. Donahue

----- Forwarded message -----

From: **Sean Donahue** <seandonahue630@gmail.com>  
Date: Wednesday, January 26, 2022  
Subject: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361  
To: "Isenberg, Kelly" <kisenberg@pa.gov>, Shannon.Crake-Lapsansky@luzernecounty.org

[Quoted text hidden]

---

**Sean Donahue** <seandonahue630@gmail.com>  
To: "ewagensell@pa.gov" <ewagensell@pa.gov>

Thu, Jan 27, 2022 at 8:06 AM

Ms. Wagenseller, Sorry, I appollgize. I hit send before I double checked. the spelling.

[Quoted text hidden]

---

**Applegate, Kyle** <kyapplegat@pa.gov>  
To: Sean Donahue <seandonahue630@gmail.com>  
Cc: "Dennis, Laura" <Laura.Dennis@luzernecounty.org>, "Isenberg, Kelly" <kisenberg@pa.gov>

Thu, Jan 27, 2022 at 8:32 AM

Good morning Mr. Donahue,

I am responding to your email on behalf of Appeals Officer Isenberg. With respect to mandamus petitions, the OOR generally does not file a certified record with the court unless there is a court order or writ. If there is a court order or writ directing the OOR to file a certified record in this matter, we will follow that court order. Thanks.

Sincerely,



**Kyle Applegate**  
Chief Counsel

Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234



Phone: (717) 346-9903

Fax: (717) 425-5343

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

@OpenRecordsPA

---

**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Wednesday, January 26, 2022 5:20 PM  
**To:** Isenberg, Kelly <kisenberg@pa.gov>; Dennis, Laura <Laura.Dennis@luzernecounty.org>  
**Subject:** [External] Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

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----- Forwarded message -----


**From:** Sean Donahue <seandonahue630@gmail.com>  
**Date:** Wed, Jan 26, 2022 at 5:18 PM  
**Subject:** Re: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361  
**To:** Isenberg, Kelly <kisenberg@pa.gov>, <Shannon.Crake-Lapsansky@luzernecounty.org>

Mr. Isenberg,

Why hasn't the OOR filed the original record with the Pronotary of the Luzerne County Court regarding this matter?

Respectfully,

Sean M. Donahue

 BRW8CC84B7242D6\_001426.pdf

On Mon, Dec 27, 2021 at 1:02 AM Sean Donahue <seandonahue630@gmail.com> wrote:

[Quoted text hidden]

To: Sean Donahue <seandonahue630@gmail.com>

Mr. Donahue,

Attached is the response from our Chief Counsel regarding this issue.

Sincerely,



**Liz Wagenseller**

Executive Director

Office of Open Records

333 Market Street, 16<sup>th</sup> Floor

Harrisburg, PA 17101-2234

(717) 346-9903

ewagensell@pa.gov

<https://openrecords.pa.gov>

@OpenRecordsPA

[Open Records in Pennsylvania Blog](#)

---

**From:** Sean Donahue seandonahue630@gmail.com

**Sent:** Thursday, January 27, 2022 8:03 AM

**To:** Wagenseller, Liz ewagensell@pa.gov

**Subject:** [External] Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

**ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).

Dear Ms. Wagensnell,

Please look into this.

Respectfully,

Sean M. Donahue

----- Forwarded message -----

From: **Sean Donahue** <seandonahue630@gmail.com>

Date: Wednesday, January 26, 2022

Subject: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361


To: "Isenberg, Kelly" <kisenberg@pa.gov>, Shannon.Crake-Lapsansky@luzernecounty.org

Mr. Isenberg,

Why hasn't the OOR filed the original record with the Pronotary of the Luzerne County Court regarding this matter?

Respectfully,

Sean M. Donahue

 **BRW8CC84B7242D6\_001426.pdf**

On Mon, Dec 27, 2021 at 1:02 AM Sean Donahue <seandonahue630@gmail.com> wrote:

[Quoted text hidden]

----- Forwarded message -----

From: "Applegate, Kyle" <kyapplegat@pa.gov>

To: Sean Donahue <seandonahue630@gmail.com>

Cc: "Dennis, Laura" <Laura.Dennis@luzernecounty.org>, "Isenberg, Kelly" <kisenberg@pa.gov>

Bcc:

Date: Thu, 27 Jan 2022 13:32:58 +0000

Subject: RE: [External] Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

Good morning Mr. Donahue,

I am responding to your email on behalf of Appeals Officer Isenberg. With respect to mandamus petitions, the OOR generally does not file a certified record with the court unless there is a court order or writ. If there is a court order or writ directing the OOR to file a certified record in this matter, we will follow that court order. Thanks.

Sincerely,



**Kyle Applegate**  
Chief Counsel

Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

Phone: (717) 346-9903

Fax: (717) 425-5343

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

@OpenRecordsPA

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**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Wednesday, January 26, 2022 5:20 PM  
**To:** Isenberg, Kelly <kisenberg@pa.gov>; Dennis, Laura <Laura.Dennis@luzernecounty.org>  
**Subject:** [External] Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

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----- Forwarded message -----


**From:** Sean Donahue <seandonahue630@gmail.com>  
**Date:** Wed, Jan 26, 2022 at 5:18 PM  
**Subject:** Re: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361  
**To:** Isenberg, Kelly <kisenberg@pa.gov>, <Shannon.Crake-Lapsansky@luzernecounty.org>

Mr. Isenberg,

Why hasn't the OOR filed the original record with the Pronotary of the Luzerne County Court regarding this matter?

Respectfully,

Sean M. Donahue

 BRW8CC84B7242D6\_001426.pdf

On Mon, Dec 27, 2021 at 1:02 AM Sean Donahue <seandonahue630@gmail.com> wrote:

Dear Mr. Isenberg,

Please look into why the certified record was not transferred to the Luzerne County Court of Common Pleas for the appeal of AP 2021-1361. The Luzerne Docket No. is 2021 10346.

Respectfully,

Sean M. Donahue

----- Forwarded message -----

From: **Sean Donahue** <seandonahue630@gmail.com>

Date: Thu, Oct 14, 2021 at 4:25 PM

Subject: Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

To: <Shannon.Crake-Lapsansky@luzernecounty.org>, Luzerne County Council Members <LCCM@luzernecounty.org>

Dear Ms. Crake-Lapsansky,

Please be advised that I am going to petition for mandamus relief in the RTKL case listed in the subject line. (Copy of Final Determination at OOR AP 2021-1361 is attached)

Please also be advised that I am going to request a peremptory judgement that Luzerne County's obligation to comply with the Final Determination is absolute.

Respectfully,

Sean M. Donahue

----- Forwarded message -----

From: **Sean Donahue** <seandonahue630@gmail.com>

Date: Tue, Aug 31, 2021 at 9:29 PM

Subject: Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

To: Griffith Jr., Walter <Walter.Griffith@luzernecounty.org>, Urban, Stephen J <Stephen.Urban@luzernecounty.org>

Will the County Council be ordering the county, via ordinance, to provide the records that OOR has ordered it to release?

----- Forwarded message -----

From: **Isenberg, Kelly** <kisenberg@pa.gov>

Date: Fri, Aug 27, 2021 at 9:11 AM

Subject: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

To: Sean Donahue <seandonahue630@gmail.com>, Dennis, Laura <Laura.Dennis@luzernecounty.org>

Dear parties,

Attached please find the final determination in the above-captioned appeal.

Thank you for your attention to this matter.

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

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 **RE: [External] Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361.eml**  
40K

# Attachment 3



Sean Donahue &lt;seandonahue630@gmail.com&gt;

**Re: [EXTERNAL]: Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361**

1 message

Dennis, Laura <Laura.Dennis@luzernecounty.org>  
To: Sean Donahue <seandonahue630@gmail.com>

Thu, Jan 27, 2022 at 11:48 AM

The Office of Law will be representing the County. If you have any questions or concerns, you may email me.

Thank you,  
Laura Dennis

---

**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Wednesday, January 26, 2022 8:59 PM  
**To:** Dennis, Laura <Laura.Dennis@luzernecounty.org>  
**Subject:** [EXTERNAL]: Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361

---

**WARNING:** This message is from an external email address. Do not click any links or open any attachments unless you recognize the sender **AND** you know that the contents of the email are safe to open.

Dear Ms. Dennis,

You have not yet entered your appearance at Luzerne 2021-10346.

Will you be entering your appearance?

Respectfully,  
Sean M. Donahue

----- Forwarded message -----

From: **Sean Donahue** <seandonahue630@gmail.com>  
Date: Wed, Jan 26, 2022 at 5:19 PM  
Subject: Fwd: FINAL DETERMINATION - Donahue v. Luzerne Co. - OOR Dkt. AP 2021-1361  
To: Isenberg, Kelly <kisenberg@pa.gov>, Dennis, Laura <Laura.Dennis@luzernecounty.org>


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 BRW8CC84B7242D6\_001426.pdf

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Sean M. Donahue

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Dear parties,

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Thank you for your attention to this matter.

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

**If you have concerns about the validity of this message,** contact the sender directly, or the Luzerne County IT Department at **Cybersecurity@LuzerneCounty.org**

## Attachment 4

## **NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY**

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

**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.

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 **August 18, 2021**.

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 **July 28, 2021**.

**If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.**

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

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 during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



**pennsylvania**  
OFFICE OF OPEN RECORDS

July 19, 2021

**Via Email Only:**

Mr. Sean Donahue  
625 Cleveland St  
Hazleton, PA 18201  
seandonahue630@gmail.com

**Via Email Only:**

Laura Dennis, Esq.  
Agency Open Records Officer  
Luzerne County  
200 North River Street  
Wilkes-Barre, PA 18711  
Laura.Dennis@luzernecounty.org

**RE: OFFICIAL NOTICE OF APPEAL - Donahue v. Luzerne County OOR Dkt. AP 2021-1361**

-----  
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 19, 2021. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

**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

# 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 enclosed information regarding the coronavirus (COVID-19). 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. Â§ 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.*

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## **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](http://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.

---



# **pennsylvania**

## **OFFICE OF OPEN RECORDS**

**APPEALS OFFICER:**

**Kelly Isenberg, Esq.**

**CONTACT INFORMATION:**

**Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> 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.



## 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.**

Rev. 6-20-2017

**Devenyi, Dylan**

---

**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Monday, July 19, 2021 11:15 AM  
**To:** Shannon.Crake-Lapsansky@luzernecounty.org; DC, OpenRecords; DC, OpenRecords  
**Cc:** Griffith Jr., Walter; Urban, Stephen J  
**Subject:** [External] Donahue v Luzerne - Appeal of Denial of RTK Request - June 2021 - Election Board  
**Attachments:** Merged Labeled Attachments to Appeal RTK Luzerne Election Board June 2021.pdf

**ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).

APPEAL OF FORMAL DENIAL OF RTK REQUEST

AGENCY: LUZERNE COUNTY ELECTION BOARD; LUZERNE COUNTY SOLICITOR; LUZERNE COUNTY COUNCIL

AGENCY RTK OFFICER: SHANNON CRAKE-LAPSANSKY, [Shannon.Crake-Lapsansky@luzernecounty.org](mailto:Shannon.Crake-Lapsansky@luzernecounty.org)

DATE OF RTK REQUEST: JUNE 12, 2021 (Attachment 1, 1.1)

DATE OF ASSERTION OF RIGHT TO EXTENSION: June 21, 2021 (Attachment 3, 3.1)

DATE OF FORMAL DENIAL: JULY 19, 2021 (Attachment 6, 6.1)

REQUESTOR: SEAN M. DONAHUE, [seandonahue630@gmail.com](mailto:seandonahue630@gmail.com), 570-454-5367

RECORDS THAT WERE REQUESTED: Documents, emails, memos and all other communications between members of the Luzerne County Election Board, Luzerne County Council and County Solicitor regarding my complaints about write-in votes not being reported and my past and possible future lawsuits regarding this matter. The County Solicitor does not represent the Election Board or the County Council. Therefore, her communications and communications to her are not privileged. (Copy of RTK Request Attached)

REASON FOR DENIAL:

"Luzerne County does not have any written records related to the subject to your request with the exception of Meeting Minutes from the County Council and Board of Elections meetings which are located on the Luzerne County website." (See Attached Copy of Denial)

FORM OF ORIGINAL RTK REQUEST: E-MAIL

RESPECTFULLY,

\_\_\_\_\_/s/\_\_\_\_\_  
SEAN M. DONAHUE

7/19/2021

Gmail - RTK REQUEST to LUZERNE 2020/2021 Elections



Sean Donahue <seandonahue630@gmail.com>

---

## RTK REQUEST to LUZERNE 2020/2021 Elections

3 messages

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Sean Donahue <seandonahue630@gmail.com>  
To: Shannon.Crake-Lapsansky@luzernecounty.org

Sat, Jun 12, 2021 at 8:07 AM

Dear Luzerne County Manager and/or Agency Open Records Officer,

Ramilda Crocamo is the county solicitor. She is not the attorney for the county Board of Elections, nor for the County Council. She cannot be because there is a conflict of interest. Therefore, any advice she gives the members of the Board of Elections or members of the County Council, or to the board and council themselves, is not privileged.

(1) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which my complaints and lawsuits about my write-in votes not being counted during the 2020 Primary Election, 2020 General Election and 2021 Primary Election were discussed. Please do not exclude or redact any information. Please be certain include copies of all documents, emails, etc. that include legal advice being given by Ms. Crocamo to individual members of the Luzerne County Council and Election Board and to the board and council themselves regarding my complaints about write in votes.

(2) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between employees and officials of the Election Bureau in which my complaints and requests regarding my write-in votes were discussed and in which denying me services from the Election Bureau because I filed or intend to file a lawsuit about write-in votes not being counted and reported properly was discussed and/or mentioned.

(3) For the time period of January 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which Dominion voting machines, the county's contract with Dominion, Dominion employees and management and Dominion in general was discussed.

A filled in and electronically signed copy of the county's RTK request form is attached.

Respectfully,  
Sean M. Donahue

---

 Microsoft Word - 2013 RTK REQUEST FORM.doc.pdf  
722K

---

Sean Donahue <seandonahue630@gmail.com>  
To: Shannon.Crake-Lapsansky@luzernecounty.org

Sat, Jun 12, 2021 at 8:18 AM

Please add item (4)

(4) For items (1) , (2) and (3), please also email to me copies of all emails, memos, documents, containing legal advice the Ms. Crocamo gave to the members of the Election Board, County Council or members thereof.

On Sat, Jun 12, 2021 at 8:07 AM Sean Donahue <seandonahue630@gmail.com> wrote:  
Dear Luzerne County Manager and/or Agency Open Records Officer,

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<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3A942709690662825600&dsqt=1&simpl=msg-a%3A942709690662825600> 1/3

## 1. Gmail - RTK REQUEST to LUZERNE 2020\_2021 Elections

7/19/2021

Gmail - RTK REQUEST to LUZERNE 2020/2021 Elections

(1) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which my complaints and lawsuit or future lawsuits about my write-in votes not being counted during the 2020 Primary Election, 2020 General Election and 2021 Primary Election were discussed. Please do not exclude or redact any information. Please be certain include copies of all documents, emails, etc. that include legal advice being given by Ms. Crocarno to individual members of the Luzerne County Council and Election Board and to the board and council themselves regarding my complaints about write in votes.

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Sean Donahue <seandonahue630@gmail.com>

Sat, Jun 19, 2021 at 2:04 PM

To: Shannon.Crake-Lapsansky@luzernecounty.org, "Griffith Jr., Walter" <Walter.Griffith@luzernecounty.org>, "Urban, Stephen J" <Stephen.Urban@luzernecounty.org>, "Haas, Harry" <Harry.Haas@luzernecounty.org>, Luzerne County Council Members <LCCM@luzernecounty.org>

Dear Ms. Crake-Lapsansky,

Please do not forget to respond to my RTK Request. I will, of course, appeal even if you do not respond. I have raised a very important issue that the county needs to address.

Respectfully,  
Sean M. Donahue

----- Forwarded message -----

From: Sean Donahue <seandonahue630@gmail.com>

Date: Sat, Jun 12, 2021 at 8:18 AM

Subject: Re: RTK REQUEST to LUZERNE 2020/2021 Elections

To: <Shannon.Crake-Lapsansky@luzernecounty.org>

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(1) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which my complaints and lawsuit or future lawsuits about my write-in votes not being counted during the 2020 Primary Election, 2020 General Election and 2021 Primary Election were discussed. Please do not exclude or redact any information. Please be certain include copies of all documents, emails, etc. that include legal advice being given by Ms. Crocarno to individual members of the Luzerne County Council and Election Board and to the board and council themselves regarding my complaints about write in votes.

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar-942709690662825600&dsqt=1&simpl=msg-a%3Ar74...> 2/3

## 1. Gmail - RTK REQUEST to LUZERNE 2020\_2021 Elections

7/19/2021

Gmail - RTK REQUEST to LUZERNE 2020/2021 Elections

(2) For the timeframe of June 1, 2020 to the present, please email me copies of every email. memo, paper document, etc.... that was shared and exchanged between employees and officials of the Election Bureau in which my complaints and requests regarding my write-in votes were discussed and in which denying me services from the Election Bureau because I filed or intend to file a lawsuit about write-in votes not being counted and reported properly was discussed and/or mentioned.

(3) For the time period of January 1, 2020 to the present, please email me copies of every email. memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which Dominion voting machines, the county's contract with Dominion, Dominion employees and management and Dominion in general was discussed.

A filled in and electronically signed copy of the county's RTK request form is attached.

Respectfully,  
Sean M. Donahue

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar-942709690662825600&dsqt=1&simpl=msg-a%3Ar74...> 3/3

1. Gmail - RTK REQUEST to LUZERNE 2020\_2021 Elections

Attachment 4      Page 10

RTK REQUEST NUMBER

DATE RECEIVED

5 DAY RESPONSE DATE



COUNTY OF LUZERNE

**RIGHT TO KNOW LAW REQUEST FORM**

NAME OF REQUESTER: Donahue Sean M  
 (PLEASE PRINT CLEARLY) LAST FIRST MI

MAILING ADDRESS: 625 Cleveland Street  
 STREET / P.O. BOX

Hazleton PA 18201  
 CITY STATE ZIP CODE

PHONE # 570-454-5367 FAX#

EMAIL ADDRESS: seandonahue630@gmail.com

SIGNATURE: -----/s/----- DATE: June 12, 2020

**RECORDS REQUESTED** - Requesters MUST specify the document(s) sought. Please use additional pages if necessary.

Please see the body of the email to which this form is attached.

This form is unnecessary for electronic requests. It was created by the county to be a bureaucratic obstacle.

**PLEASE CHECK ONE OF THE FOLLOWING:**

- ☐ I AM ONLY REQUESTING ACCESS TO THE DOCUMENT(S)  
☐ I AM REQUESTING A HARD COPY OF THE DOCUMENT(S) (PAPER, CD, etc...)  
☒ I AM REQUESTING AN E-FILE OF THE DOCUMENT(S) (IF AVAILABLE) (PDF, EXCEL SPRDSHT, etc...)

PLEASE NOTE: LUZERNE COUNTY IS NOT REQUIRED TO CREATE A RECORD WHICH DOES NOT CURRENTLY EXIST OR TO COMPILE, MAINTAIN, FORMAT OR ORGANIZE A RECORD IN A MANNER IN WHICH THE AGENCY DOES NOT CURRENTLY COMPILE, MAINTAIN, FORMAT OR ORGANIZE THE RECORD

7/19/2021

Gmail - APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE COUNTY ELECTIONS BOARD/COUNCIL/BUREAU - RTK ...



Sean Donahue <seandonahue630@gmail.com>

---

**APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE COUNTY  
ELECTIONS BOARD/COUNCIL/BUREAU - RTK REQUEST to LUZERNE 2020/2021  
Elections**

1 message

---

Sean Donahue <seandonahue630@gmail.com>

Mon, Jun 21, 2021 at 8:36 AM

To: openrecords@pa.gov, Shannon.Crake-Lapsansky@luzernecounty.org

APPEAL OF DEEMED DENIAL OF RTK REQUEST

AGENCY: LUZERNE COUNTY ELECTION BOARD

AGENCY RTK OFFICER: SHANNON CRAKE-LAPSANSKY, Shannon.Crake-Lapsansky@luzernecounty.org

DATE OF RTK REQUEST: JUNE 12, 2021

DATE OF DEEMED DENIAL: JUNE 17, 2021

REQUESTOR: SEAN M. DONAHUE, seandonahue630@gmail.com, 570-454-5367

RECORDS THAT WERE REQUESTED: Documents, emails, memos and all other communications between members of the Luzerne County Election Board, Luzerne County Council and County Solicitor regarding my complaints about write-in votes not being reported and my past and possible future lawsuits regarding this matter. The County Solicitor does not represent the Election Board or the County Council. Therefore, her communications and communications to her are not privileged.

FORM OF ORIGINAL RTK REQUEST: E-MAIL (Small copied below; PDF copy of original filled in and submitted Luzerne County RTK Request Form is Attached)

RESPECTFULLY,

/S/  
SEAN M. DONAHUE

----- Forwarded message -----

From: Sean Donahue <seandonahue630@gmail.com>

Date: Sat, Jun 19, 2021 at 2:04 PM

Subject: Fwd: RTK REQUEST to LUZERNE 2020/2021 Elections

To: <Shannon.Crake-Lapsansky@luzernecounty.org>, Griffith Jr., Walter <Walter.Griffith@luzernecounty.org>, Urban, Stephen J <Stephen.Urban@luzernecounty.org>, Haas, Harry <Harry.Haas@luzernecounty.org>, Luzerne County Council Members <LCCM@luzernecounty.org>

Dear Ms. Crake-Lapansky,

Please do not forget to respond to my RTK Request. I will, of course, appeal even if you do not respond. I have raised a very important issue that the county needs to address.

Respectfully,  
Sean M. Donahue

----- Forwarded message -----

From: Sean Donahue <seandonahue630@gmail.com>

Date: Sat, Jun 12, 2021 at 8:18 AM

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2. Gmail - APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE C

7/19/2021

Gmail - APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE COUNTY ELECTIONS BOARD/COUNCIL/BUREAU - RTK ...

Subject: Re: RTK REQUEST to LUZERNE 2020/2021 Elections

To: <Shannon.Crake-Lapsansky@luzernecounty.org>

Please add item (4)

(4) For items (1) , (2) and (3), please also email to me copies of all emails, memos, documents, containing legal advice the Ms. Crocamo gave to the members of the Election Board, County Council or members thereof.

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Sean M. Donahue

 Microsoft Word - 2013 RTK REQUEST FORM.doc.pdf  
722K

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar-8789569553683721257&simpl=msg-a%3Ar-8787917...> 2/2

2. Gmail - APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE C



RTK REQUEST NUMBER

DATE RECEIVED

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COUNTY OF LUZERNE

**RIGHT TO KNOW LAW REQUEST FORM**

NAME OF REQUESTER: Donahue Sean M  
 (PLEASE PRINT CLEARLY) LAST FIRST MI

MAILING ADDRESS: 625 Cleveland Street  
 STREET / P.O. BOX

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PHONE # 570-454-5367 FAX#

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7/19/2021

Gmail - Re: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections



Sean Donahue <seandonahue630@gmail.com>

---

**Re: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections**

1 message

---

**Crake-Lapsansky, Shannon** <Shannon.Crake-Lapsansky@luzernecounty.org>  
To: Sean Donahue <seandonahue630@gmail.com>

Mon, Jun 21, 2021 at 9:11 AM

Mr. Donahue:

We require a 30 day extension to complete processing this right to know request.

Shannon Crake Lapsansky, Esq.  
Assistant Solicitor  
Luzerne County Office of Law

---

**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Saturday, June 12, 2021 8:07 AM  
**To:** Crake-Lapsansky, Shannon <Shannon.Crake-Lapsansky@luzernecounty.org>  
**Subject:** [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections

---

**WARNING:** This message is from an external email address. Do not click any links or open any attachments unless you recognize the sender **AND** you know that the contents of the email are safe to open.

---

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A filled in and electronically signed copy of the county's RTK request form is attached.

Respectfully,  
Sean M. Donahue  
If you have concerns about the validity of this message, contact the sender directly, or the Luzerne County IT Department at  
Cybersecurity@LuzerneCounty.org

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-f%3A1703182184258903256&simpl=msg-f%3A17031821842...> 1/2

3. Gmail - Re\_ [EXTERNAL]\_ RTK REQUEST to LUZERNE 2020\_2021 Elections

7/19/2021

Gmail - Re: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections

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 extension.pdf  
75K

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-f%3A1703182184258903256&simpl=msg-f%3A17031821842...> 2/2

3. Gmail - Re\_ [EXTERNAL]\_ RTK REQUEST to LUZERNE 2020\_2021 Elections

Attachment 4      Page 16



LUZERNE COUNTY OFFICE OF LAW  
ROMILDA CROCAMO, ESQ.  
Luzerne County Chief Solicitor

**COUNTY of LUZERNE**  
P E N N S Y L V A N I A  
ESTABLISHED 1786

Right-To-Know Response Form

Date: June 17, 2021  
Date Request Received: June 11, 2021  
Five Business Day Response Date: June 18, 2021

Mr. Sean Donahue

Via email

Dear Mr. Donahue,

Thank you for writing to Luzerne County with your requests for information pursuant to the Pennsylvania Right-To-Know Law.

Your requests for information has been received and is under review. The Pennsylvania Right-To-Know Law requires a response within five (5) business days; however, we require a thirty (30) day extension for the following reason(s):

- ☐ (1) the request for access requires redaction of a record in accordance with section 706;
- ☐ (2) the request for access requires the retrieval of a record stored in a remote location;
- ☐ (3) a timely response to the request for access cannot be accomplished due to bona fide and specified staffing limitations;
- ☒ (4) a legal review is necessary to determine whether the record is a record subject to access under this act;
- ☐ (5) the requester has not complied with the agency's policies regarding access to records;
- ☐ (6) the requester refuses to pay applicable fees authorized by this act; or
- ☒ (7) the extent or nature of the request precludes a response within the required time period.

---

Courthouse • 200 North River Street • Wilkes-Barre, Pennsylvania 18711  
voice 570.825.1500 fax 570.825.9343 tdd 570.825.1860

You should expect a response to your request no later than July 11, 2021.

Respectfully,

Shannon Crake Lapsansky, Esquire  
Interim Luzerne County Open Records Officer  
Luzerne County Office of Law  
200 North River Street  
Wilkes-Barre, PA 18711  
(570)825-1598

7/19/2021

Gmail - Donahue v. Luzerne Co: AP 2021-1210



Sean Donahue <seandonahue630@gmail.com>

---

**Donahue v. Luzerne Co: AP 2021-1210**

2 messages

**DC, OpenRecords** <RA-OpenRecords@pa.gov>

Tue, Jun 22, 2021 at 12:49 PM

To: "seandonahue630@gmail.com" <seandonahue630@gmail.com>, "Dennis, Laura" <Laura.Dennis@luzernecounty.org>, "Shannon.Crake-Lapsansky@luzernecounty.org" <Shannon.Crake-Lapsansky@luzernecounty.org>  
Cc: "Applegate, Kyle" <kyapplegat@pa.gov>

Dear Parties,

Please find attached an appeal that has been submitted to the Office of Open Records and the final determination that has been made.

Sincerely,



**Dylan Devenyi**

Administrative Officer  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | **Fax** (717) 425-5343

<https://openrecords.pa.gov>

@OpenRecordsPA

---

2021-1210\_Donahue-LuzerneCo.pdf  
984K

**Sean Donahue** <seandonahue630@gmail.com>

Tue, Jun 22, 2021 at 1:29 PM

Draft To: "DC, OpenRecords" <RA-OpenRecords@pa.gov>

Cc: "Dennis, Laura" <Laura.Dennis@luzernecounty.org>, "Shannon.Crake-Lapsansky@luzernecounty.org" <Shannon.Crake-Lapsansky@luzernecounty.org>, "Applegate, Kyle" <kyapplegat@pa.gov>

Dear OOR,

[Quoted text hidden]

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-f%3A1703286472569459463&simpl=msg-f%3A17032864725...> 1/1

4. Gmail - Donahue v. Luzerne Co\_ AP 2021-1210



### **FINAL DETERMINATION**

DATE ISSUED AND MAILED: June 22, 2021

IN RE: *Sean Donahue v. Luzerne County*, OOR Dkt. AP 2021-1210

Upon review of the appeal filed with the Office of Open Records ("OOR") to the above-referenced docket number, it is determined that the appeal is **DISMISSED** because:

**The appeal is premature.** The Request was submitted to the County's Open Records Officer on June 12, 2021 a Saturday, and would have been received on the next business day, June 14, 2021. The County had five (5) *business* days to respond, or until June 21, 2021, at the earliest.<sup>1</sup> 65 P.S. § 67.901. The appeal was submitted to the OOR on June 21, 2021. The Requester is not prohibited from filing a new appeal to the OOR of any denial or deemed denial stemming from the Request, pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

For this reason, the County is not required to take any further action. Within thirty days of the mailing date of this Final Determination, you may appeal or petition for review with the Luzerne County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per 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.<sup>2</sup>

Issued by:

/s/ Kyle Applegate

---

Chief Counsel  
Kyle Applegate, Esq.

Sent to: Requester, Agency Open Records Officer

---

<sup>1</sup> If the County's offices were closed in observance of the Juneteenth Holiday on June 18<sup>th</sup>, 2021, then the deadline to respond would be June 22, 2021 instead.

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

## DC, OpenRecords

---

**From:** Sean Donahue <seandonahue630@gmail.com>  
**Sent:** Monday, June 21, 2021 8:37 AM  
**To:** DC, OpenRecords; Shannon.Crake-Lapsansky@luzernecounty.org  
**Subject:** [External] APPEAL OF DEEMED DENIAL -SEAN M. DONAHUE V LUZERNE COUNTY ELECTIONS BOARD/COUNCIL/BUREAU - RTK REQUEST to LUZERNE 2020/2021 Elections  
**Attachments:** Microsoft Word - 2013 RTK REQUEST FORM.doc.pdf

**ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).

APPEAL OF DEEMED DENIAL OF RTK REQUEST

AGENCY: LUZERNE COUNTY ELECTION BOARD

AGENCY RTK OFFICER: SHANNON CRAKE-LAPSANSKY, [Shannon.Crake-Lapsansky@luzernecounty.org](mailto:Shannon.Crake-Lapsansky@luzernecounty.org)

DATE OF RTK REQUEST: JUNE 12, 2021

DATE OF DEEMED DENIAL: JUNE 17, 2021

REQUESTOR: SEAN M. DONAHUE, [seandonahue630@gmail.com](mailto:seandonahue630@gmail.com), 570-454-5367

RECORDS THAT WERE REQUESTED: Documents, emails, memos and all other communications between members of the Luzerne County Election Board, Luzerne County Council and County Solicitor regarding my complaints about write-in votes not being reported and my past and possible future lawsuits regarding this matter. The County Solicitor does not represent the Election Board or the County Council. Therefore, her communications and communications to her are not privileged.

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RESPECTFULLY,  
\_\_\_\_\_/s/\_\_\_\_\_  
SEAN M. DONAHUE

----- Forwarded message -----

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**Date:** Sat, Jun 19, 2021 at 2:04 PM  
**Subject:** Fwd: RTK REQUEST to LUZERNE 2020/2021 Elections  
**To:** <[Shannon.Crake-Lapsansky@luzernecounty.org](mailto:Shannon.Crake-Lapsansky@luzernecounty.org)>, Griffith Jr., Walter <[Walter.Griffith@luzernecounty.org](mailto:Walter.Griffith@luzernecounty.org)>, Urban, Stephen J <[Stephen.Urban@luzernecounty.org](mailto:Stephen.Urban@luzernecounty.org)>, Haas, Harry <[Harry.Haas@luzernecounty.org](mailto:Harry.Haas@luzernecounty.org)>, Luzerne County Council Members <[LCCM@luzernecounty.org](mailto:LCCM@luzernecounty.org)>



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Sean M. Donahue

----- Forwarded message -----

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Please add item (4)

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Respectfully,  
Sean M. Donahue

RTK REQUEST NUMBER

DATE RECEIVED

5 DAY RESPONSE DATE



COUNTY OF LUZERNE

**RIGHT TO KNOW LAW REQUEST FORM**

NAME OF REQUESTER: Donahue Sean M  
 (PLEASE PRINT CLEARLY) LAST FIRST MI

MAILING ADDRESS: 625 Cleveland Street  
 STREET / P.O. BOX

Hazleton PA 18201  
 CITY STATE ZIP CODE

PHONE # 570-454-5367 FAX#

EMAIL ADDRESS: seandonahue630@gmail.com

SIGNATURE: -----/s/----- DATE: June 12, 2020

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Sean Donahue &lt;seandonahue630@gmail.com&gt;

## Donahue v. Luzerne Co: AP 2021-1210 - Fwd: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections

1 message

Sean Donahue &lt;seandonahue630@gmail.com&gt;

Tue, Jun 22, 2021 at 1:34 PM

To: "DC, OpenRecords" <RA-OpenRecords@pa.gov>, "Dennis, Laura" <Laura.Dennis@luzernecounty.org>, "Shannon.Crake-Lapsansky@luzernecounty.org" <Shannon.Crake-Lapsansky@luzernecounty.org>, "Applegate, Kyle" <kyapplegat@pa.gov>, Luzerne County Council Members <LCCM@luzernecounty.org>

Please be advised that on June 21, 2021 Luzerne County asserted their right to an extension. (Copy Attached) The extension is mistakenly backdated to June 17, 2021. If this was not an error, there was no need for this. The county should stop doing things like this. It causes the public to distrust the county.

----- Forwarded message -----

From: **Crake-Lapsansky, Shannon** <Shannon.Crake-Lapsansky@luzernecounty.org>  
 Date: Mon, Jun 21, 2021 at 9:11 AM  
 Subject: Re: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections  
 To: Sean Donahue <seandonahue630@gmail.com>

Mr. Donahue:

We require a 30 day extension to complete processing this right to know request.

Shannon Crake Lapsansky, Esq.  
 Assistant Solicitor  
 Luzerne County Office of Law

From: Sean Donahue <seandonahue630@gmail.com>  
 Sent: Saturday, June 12, 2021 8:07 AM  
 To: Crake-Lapsansky, Shannon <Shannon.Crake-Lapsansky@luzernecounty.org>  
 Subject: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections

**WARNING:** This message is from an external email address. Do not click any links or open any attachments unless you recognize the sender **AND** you know that the contents of the email are safe to open.

Dear Luzerne County Manager and/or Agency Open Records Officer,

Ramilda Crocamo is the county solicitor. She is not the attorney for the county Board of Elections, nor for the County Council. She cannot be because there is a conflict of interest. Therefore, any advice she gives the members of the Board of Elections or members of the County Council, or to the board and council themselves, is not privileged.

(1) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which my complaints and lawsuit or future lawsuits about my write-in votes not being counted during the 2020 Primary Election, 2020 General Election and 2021 Primary Election were discussed. Please do not exclude or redact any information. Please be certain include copies of all documents, emails, etc. that include legal advice being given by Ms. Crocamo to individual members of the Luzerne County Council and Election Board and to the board and council themselves regarding my complaints about write in votes.

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar1679697102618865988&simpl=msg-a%3Ar671956706...> 1/2

7/19/2021

Gmail - Donahue v. Luzerne Co: AP 2021-1210 - Fwd: [EXTERNAL]: RTK REQUEST to LUZERNE 2020/2021 Elections

(2) For the timeframe of June 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between employees and officials of the Election Bureau in which my complaints and requests regarding my write-in votes were discussed and in which denying me services from the Election Bureau because I filed or intend to file a lawsuit about write-in votes not being counted and reported properly was discussed and/or mentioned.

(3) For the time period of January 1, 2020 to the present, please email me copies of every email, memo, paper document, etc.... that was shared and exchanged between all members of the county Election Board and County Council that made reference to and/or in which Dominion voting machines, the county's contract with Dominion, Dominion employees and management and Dominion in general was discussed.

A filled in and electronically signed copy of the county's RTK request form is attached.

Respectfully,

Sean M. Donahue

If you have concerns about the validity of this message, contact the sender directly, or the Luzerne County IT Department at [Cybersecurity@LuzerneCounty.org](mailto:Cybersecurity@LuzerneCounty.org)

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 extension.pdf  
75K

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar1679697102618865988&simpl=msg-a%3Ar671956706...> 2/2

5. Gmail - Donahue v. Luzerne Co\_ AP 2021-1210 - Fwd\_ [EXTERNAL]\_ RTK REQ



LUZERNE COUNTY OFFICE OF LAW  
ROMILDA CROCAMO, ESQ.  
Luzerne County Chief Solicitor

**COUNTY of LUZERNE**  
P E N N S Y L V A N I A  
ESTABLISHED 1786

Right-To-Know Response Form

Date: June 17, 2021  
Date Request Received: June 11, 2021  
Five Business Day Response Date: June 18, 2021

Mr. Sean Donahue

Via email

Dear Mr. Donahue,

Thank you for writing to Luzerne County with your requests for information pursuant to the Pennsylvania Right-To-Know Law.

Your requests for information has been received and is under review. The Pennsylvania Right-To-Know Law requires a response within five (5) business days; however, we require a thirty (30) day extension for the following reason(s):

- \_\_\_\_\_ (1) the request for access requires redaction of a record in accordance with section 706;
- \_\_\_\_\_ (2) the request for access requires the retrieval of a record stored in a remote location;
- \_\_\_\_\_ (3) a timely response to the request for access cannot be accomplished due to bona fide and specified staffing limitations;
- \_\_\_x\_\_\_ (4) a legal review is necessary to determine whether the record is a record subject to access under this act;
- \_\_\_\_\_ (5) the requester has not complied with the agency's policies regarding access to records;
- \_\_\_\_\_ (6) the requester refuses to pay applicable fees authorized by this act; or
- \_\_\_X\_\_\_ (7) the extent or nature of the request precludes a response within the required time period.

---

Courthouse • 200 North River Street • Wilkes-Barre, Pennsylvania 18711  
voice 570.825.1500 fax 570.825.9343 tdd 570.825.1860

5.1 extension

You should expect a response to your request no later than July 11, 2021.

Respectfully,

Shannon Crake Lapsansky, Esquire  
Interim Luzerne County Open Records Officer  
Luzerne County Office of Law  
200 North River Street  
Wilkes-Barre, PA 18711  
(570)825-1598

7/19/2021

Gmail - Right to Know Request



Sean Donahue <seandonahue630@gmail.com>

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**Right to Know Request**

1 message

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**Crake-Lapsansky, Shannon** <Shannon.Crake-Lapsansky@luzernecounty.org>  
To: Sean Donahue <seandonahue630@gmail.com>

Mon, Jul 19, 2021 at 9:07 AM

Mr. Donahue:

Please see attached regarding your right to know request.

Shannon Crake Lapsansky, Esq.  
Assistant Solicitor  
Luzerne County Office of Law

If you have concerns about the validity of this message, contact the sender directly, or the Luzerne County IT Department at [Cybersecurity@LuzerneCounty.org](mailto:Cybersecurity@LuzerneCounty.org)

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 **response.pdf**  
108K

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## 6. Gmail - Right to Know Request



**COUNTY of LUZERNE**  
P E N N S Y L V A N I A  
E S T A B L I S H E D 1 7 8 6

**Right-To-Know Response Form**

**Denial**

July 19, 2021

**Mr. Sean Donahue**

Via email only: seandonahue630@gmail.com

Mr. Donahue,

Thank you for writing to Luzerne County with your request for information pursuant to the Pennsylvania Right-To-Know law. We recently received from you a request for records as described in the attached Right To Know request. Your request is denied for the following reasons, as permitted by Section 705 of the Act.

Cited from the Right To Know Law Section 705:

Section 705. Creation of record.

When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.

Luzerne County does not have any written records related to the subject to your request with the exception of Meeting Minutes from the County Council and Board of Elections meetings which are located on the Luzerne County website.

You have a right to appeal this denial of information in writing to Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4<sup>th</sup> Floor, Harrisburg, PA 17120.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. Section 1101. If you have further questions, please contact the undersigned. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,

Shannon Crake Lapsansky, Esq.  
Interim Open Records Officer  
Luzerne County  
200 North River Street  
Wilkes-Barre, PA 18711  
(570)825-1598



7/19/2021

Gmail - Election Board RTK Request of July 2021



Sean Donahue <seandonahue630@gmail.com>

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**Election Board RTK Request of July 2021**

1 message

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Sean Donahue <seandonahue630@gmail.com>

Mon, Jul 19, 2021 at 10:30 AM

To: "Urban, Stephen J" <Stephen.Urban@luzernecounty.org>, "Griffith Jr., Walter" <Walter.Griffith@luzernecounty.org>

Dear Stephen J and Walter,

It is my position that the county solicitor does not represent the election board and that his/her legal advice is not privileged precisely because the solicitor's office does not represent the election board. However, on many occasions, when I asked questions at public meetings, they claimed to be under the advisement of Ms. Romilda Crocamo not to answer or reply to my comments and questions.

Today, the solicitor's office claims that there is no written record, electronic or otherwise, of Ms. Crocamo or the solicitor's office giving legal advice to the election board, nor is there any such record, such as email, of the election board asking the solicitor's office. i.e., Ms. Crocamo, for legal advice. Yet, we know that consecutive election boards repeatedly turned to her for legal advice.

Are you aware of any emails, memos or written records, in which, the solicitor's office gave legal advice to the election board and, likewise, comparable records of the election board seeking such advice from Ms. Carocamo and the solicitor's office, rather than seeking advice from their own solicitor, Mr. Butera?

Respectfully,  
Sean

<https://mail.google.com/mail/u/0?ik=937b67355a&view=pt&search=all&permthid=thread-a%3Ar4586081952967594909&simpl=msg-a%3Ar458773443...> 1/1

## 7. Gmail - Election Board RTK Request of July 2021

# Attachment 5



Sean Donahue &lt;seandonahue630@gmail.com&gt;

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**Donahue v. Luzerne Co: AP 2021-1361**

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**Sean Donahue** <seandonahue630@gmail.com>

Mon, Jul 19, 2021 at 4:16 PM

To: "DC, OpenRecords" &lt;RA-OpenRecords@pa.gov&gt;, "Isenberg, Kelly" &lt;kisenberg@pa.gov&gt;

Cc: "Dennis, Laura" &lt;Laura.Dennis@luzernecounty.org&gt;, "Griffith Jr., Walter" &lt;Walter.Griffith@luzernecounty.org&gt;, "Urban, Stephen J" &lt;Stephen.Urban@luzernecounty.org&gt;, Election Board Distribution Group &lt;ElectionBoard@luzernecounty.org&gt;, Luzerne County Council Members &lt;LCCM@luzernecounty.org&gt;

Dear Mr. Isenberg,

There is clear reason to believe that responsive records exist. I think you can glean from the attached email response from Luzerne County Council member Walter Griffith that there exists more than a preponderance of evidence that the County solicitor was giving legal advice to the county's election board and to the the Luzerne County Council regarding the counting of write-in votes and other election matters. Therefore, documentation of this advice is more probable than not to exist. (See Attachment 7.1)

I think the OOR should conduct a review of the recordings of public meetings and solicit affidavit responses from each past and present member of both the Luzerne County Council and Election Board, as well as the county solicitor's office.

Respectfully,  
Sean M. Donahue

[Quoted text hidden]

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 **7.1 Gmail - Re\_ [EXTERNAL]\_ Election Board RTK Request of July 2021.pdf**  
99K

# Attachment 5



Sean Donahue &lt;seandonahue630@gmail.com&gt;

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**Re: [EXTERNAL]: Election Board RTK Request of July 2021**

2 messages

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**Griffith Jr., Walter** <Walter.Griffith@luzernecounty.org>

Mon, Jul 19, 2021 at 10:42 AM

To: Sean Donahue &lt;seandonahue630@gmail.com&gt;, "Urban, Stephen J" &lt;Stephen.Urban@luzernecounty.org&gt;

Sean

You need to go back and listen to the recordings.

Particularly the one where Stephen Urban was appointed to be chairman and you will see clearly that the office of law did give legal advice. That's one very apparent situation And there are several others if you go back and listen to the recordings

Walter L Griffith JR  
Luzerne County Council  
"A Voice for the People"

---

**From:** Sean Donahue <seandonahue630@gmail.com>**Sent:** Monday, July 19, 2021 10:30:25 AM**To:** Urban, Stephen J <Stephen.Urban@luzernecounty.org>; Griffith Jr., Walter <Walter.Griffith@luzernecounty.org>**Subject:** [EXTERNAL]: Election Board RTK Request of July 2021

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**WARNING:** This message is from an external email address. Do not click any links or open any attachments unless you recognize the sender **AND** you know that the contents of the email are safe to open.

Dear Stephen J and Walter,

It is my position that the county solicitor does not represent the election board and that his/her legal advice is not privileged precisely because the solicitor's office does not represent the election board. However, on many occasions, when I asked questions at public meetings, they claimed to be under the advisement of Ms. Romilda Crocamo not to answer or reply to my comments and questions.

Today, the solicitor's office claims that there is no written record, electronic or otherwise, of Ms. Crocamo or the solicitor's office giving legal advice to the election board, nor is there any such record, such as email, of the election board asking the solicitor's office. i.e., Ms. Crocamo, for legal advice. Yet, we know that consecutive election boards repeatedly turned to her for legal advice.

Are you aware of any emails, memos or written records, in which, the solicitor's office gave legal advice to the election board and, likewise, comparable records of the election board seeking such advice from Ms. Carocamo and the solicitor's office, rather than seeking advice from their own solicitor, Mr. Butera?

Respectfully,  
Sean

If you have concerns about the validity of this message, contact the sender directly, or the Luzerne County IT Department at [Cybersecurity@LuzerneCounty.org](mailto:Cybersecurity@LuzerneCounty.org)

---

**Sean Donahue** <seandonahue630@gmail.com>

Mon, Jul 19, 2021 at 11:16 AM

To: "Griffith Jr., Walter" &lt;Walter.Griffith@luzernecounty.org&gt;

Cc: "Urban, Stephen J" &lt;Stephen.Urban@luzernecounty.org&gt;

Yes. But I want to get any written records, that may exist, released to the public.

[Quoted text hidden]

# Attachment 5

<https://mail.google.com/mail/u/0/?ik=937b67355a&view=pt&search=all&permthid=thread-f%3A1705724621203938308&simpl=msg-f%3A17057246212...> 1/1

# Attachment 6

**LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATION  
AGENDA**

VIDEO/TELECONFERENCE VIA ZOOM - July 14, 2021 at 5:00 P.M.

**CALL TO ORDER**

**PLEDGE OF ALLEGIANCE**

**ROLL CALL**

**ADDITIONS TO/DELETIONS FROM AGENDA**

**APPROVAL OF AGENDA**

**PUBLIC COMMENT ON AGENDA ITEMS**

This is an opportunity for members of the public to address the Board on matters listed on the Agenda. (limited to 4 minutes & one comment time per person) Please refer to the Board of Elections and Registration Online page of County's Website at <https://www.luzernecounty.org/1082/Board-of-Elections-and-Registration> for more information on how to participate in Public Comment via technology.

**APPROVAL OF MEETING MINUTES FROM JUNE 16, 2021 (See Attached pp. 4-8)**

**AGENDA ITEMS - SOLICITOR**

1. Updated Website Overview of Board of Elections & Registration (See attached p. 9)
2. November Ballot - DA Length of Term Determination (2 or 4 Years)
3. Status/Update of DA Investigation of May Primary Election including Complaints Forwarded and Submitted

Attachment 6

**AGENDA ITEMS - BUREAU OF ELECTION**

1. Update on / Status of Board of Elections & Registration Directives (See attached p. 3)

**AGENDA ITEMS - BOARD OF ELECTIONS & REGISTRATION**

4. Board of Elections & Registration FaceBook Page (AS)
5. Ballot Drop Boxes for November Election (DW)

**PUBLIC COMMENT ON NON-AGENDA ITEMS**

This is an opportunity for members of the public to address the Board on matters not listed on the Agenda but which must be within the subject matter jurisdiction of the Board. Please refer to the Board of Elections and Registration Online page of County's Website at <https://www.luzernecounty.org/1082/Board-of-Elections-and-Registration> for more information on how to participate in Public Comment via technology.

**MOTION TO ADJOURN**

**ADJOURNMENT**

## Board of Elections & Registration Directives to Bureau of Elections

1. **Written Outline of Process for Handling Complaints or Issues at State or Local Level & Report of Follow Up to Complaints or Issues from the May 2021 Primary.** Submit both to Board of Elections & Registration by July 9, 2021
6. **Posting of May 2021 Primary Campaign Finance Reports** to county website in a “user-friendly” manner. Complete by July 16, 2021.
3. **Written plan/process created and completed for May 2021 Primary Poll worker Feedback.** All feedback received will be shared with the Board of Elections & Registration. Complete by July 30, 2021
4. **Creation of plan - going forward - to post Campaign Finance Reports** on the website after each of the pre-election and post-election mandated dates for campaign finance reporting. Submit plan to Board of Elections & Registration by August 13, 2021.
7. **Plan and Implementation of an Election Day Poll Worker/Bureau Staff Direct Communication Means.** Submit plan to Board of Elections & Registration by August 30, 2021
6. **Evaluation/Review of current poll worker training program** with focus on attendance and understanding of directions and ways to improve both. Submit findings and proposed changes for improvement by August 30, 2021
7. **Written outline of basic procedures and practices for “Election Operations of the Bureau”** (Pre-Election Day Procedures, Election Day Procedures, Adjudication Procedures, and Post-Election Day Procedures). Submit by September 30, 2021
8. **Documentation of/outline of job descriptions** for each position in the Bureau of Elections. This should be specific and itemized to the fullest extent possible. Overlap with duties and responsibilities between positions should be noted in job description. Submit by October 15, 2021
9. **Research for, and upgrade of the Bureau of Elections Website** to a more “user-friendly” platform with well-formatted content that is easy to scan. Complete by October 30, 2021



LUZERNE COUNTY BOARD OF ELECTIONS  
AND REGISTRATIONS MEETING  
MINUTES JUNE 16, 2021

CALL TO ORDER 6:01 PM

ROLL CALL

Kathy Roth here, Audrey Serniak here, Missy Thomas here, Richard Nardone here, Denise Williams here

EXECUTIVE SESSION 6:02-6:12 PM

Romilda Crocamo stated she advised the Board that Stephen Urban reported the Swoyersville Ward 1 recanvassing to the DA. No deliberations took place.

APPROVAL OF AGENDA

Motion to approve Rick Nardone 2nd Kathy Roth unanimous motions carries

PUBLIC COMMENTS (4 minutes)

Elizabeth McGarrigan, Penn Lake-Will the official count be on the website, including write ins? Denise Williams-the count is currently posted. Do absentee ballots go to the polling place? Bob Morgan-no, they go to the Bureau, a list is posted but not up to date, procedure changed with Act 77.

Mark Rabo-Concerned about the drop box security in Hazleton City, objected to the tabletop mounting and fixed camera, easy to be stolen. Out of state people voted in PA. The voting machines were in unsecured locations with public access prior to election day. Needs to be remedied; security paramount. New machines needed; people left because they were frustrated with the machines.

Keith Gould-has an issue with scattering votes; wants his Fairview Ward 2 write ins to count; votes were accepted on the Democratic side but not the Republican; knows how to fill out mail in ballot. Wouldn't vote to certify November 2020 election because of scattering-travesty. Use machines to avoid having votes thrown away.

Sean Donahue-echo scattering concerns; should not scatter and should not certify. Wants to know why the Board directed the Bureau not to discuss his votes with him. Romilda Crocamo-advised Board not to respond because of his notice to file a petition. S.D. Sees a conflict in the Office of Law advising the Board; do not certify the election because of scattering.

Walter Griffith-wants to see a precinct by precinct count; these are public records, if they are public documents people have a right to see them (Sect 308). Thinks the Office of Law is not

giving correct advice. Happy Face Book page is being addressed. The Board's county web page also needs attention.

#### MINUTES

Motion to accept minutes from May 12, 2021; May 18-June 2, 2021; May 24, 2021; June 4, 2021; June 7, 2021 made by Kathy Roth 2nd Missy Thomas unanimous motion carries

#### SOLICITOR'S REPORT

Mike Butera advised that the hearing to request a recount took place yesterday and the petition was denied; there is no reason not to certify the election. Advised that Walter Griffith was correct regarding the public records but they are not all available yet because we are still closing out the election.

#### BUREAU OF ELECTIONS REPORT

Bob Morgan reported that the drop boxes worked relatively well. Hazleton was picked up once a day for a total of about 190 ballots; Nanticoke was picked up once a day for a total of about 350 ballots; Pittston was picked up once a day when the library was opened for a total of 700 ballots; Penn Place was picked up twice a day (once on Sunday) for a total of 2000 ballots; total dropped off about 3200 ballots.

The request purge of the election roles was completed today; voters who had not voted in two federal election over 5 years were removed; they were notified by mail; 17,420 records were removed; 192-193,000 voters remain

#### BOARD OF ELECTIONS REPORT

#### CERTIFICATION OF THE REST OF THE MAY 18, 2021 ELECTION

Denise Williams gave her thoughts and observations. Out of the past 5 elections this one had the second highest turnout. Except for the header issue the ballots were correct and could always be checked. The audit (3.15% of the ballots) showed a 99.9% accuracy. Has confidence in a yes certification vote.

Motion to certify the 2021 primary election made by Rick Nardone 2nd Audrey Serniak  
Kathy Roth yes, Audrey Serniak yes, Missy Thomas abstain (when asked why she abstained, Missy Thomas said she was unable to take part in the process and thinks there are no issues)  
Rick Nardone yes, Denise Williams yes 4 yes, 1 abstain, 0 no motion carries

#### STATE ETHICS RESPONSE TO DENISE WILLIAM'S VOLUNTEER WORK WITH

## FAIR DISTRICTS PA

As promised, Denise Williams immediately resigned from all roles with Fair Districts. The response from the State Ethics Commission said there is no conflict of interest because 1103A of the Ethics Act does not prevent volunteer work. Denise Williams could continue to participate but chooses not to in order to devote her full time to the Board of Elections. Romilda Crocamo stated the Chair covered the essence of the response from from Ethics.

## FACE BOOK PAGE

Audrey Serniak stated it was time to shut down the Board's Face Book page because it has outlived its usefulness.

Motion to shut down the page made by Audrey Serniak 2nd Rick Nardone unanimous motion carries

## OVERVIEW OF BOARD OF ELECTIONS AND REGISTRATION

Denise Williams added a paragraph to the county website overview of the Board. It will be reviewed by the Office of Law before posting.

Rick Nardone has no issue with the addition. He does want a third party to develop a web page for the Board to resolve some of the concerns with Dominion products and Board processes. He is not comfortable with communication processes but has nothing against the county's IT department. He is willing to do some research into this.

## DIRECTIVES TO THE BUREAU OF ELECTIONS

1. Complaints-need to know process, how complaints are handled
2. Finance reports need to be user friendly
3. Poll worker feedback-Rick Nardone suggested surveys and feedback from pollworkers, better training and process improvement; big change from few workers, locations, and equipment to 1000+ workers, 140+ locations, many more machines
4. Plan to post campaign finance information on time
5. Communication on election day-need better means to contact Judges of Elections and avoid overload at certain times; several means of contact may be needed
6. Poll worker training-needs improvement, perhaps videos can be posted
7. All election processes should be documented
8. Job descriptions
9. Website needs improvement-the entire county website is difficult to navigate

Bob Morgan-These are things we've all been discussing and the timelines are not unreasonable; currently working on campaign finances

There needs to be a focus group with poll workers to find out what's right and what's wrong. He is looking forward to working with the Board and implementing council's inquiry committee suggestions

Eryn Harvey-This reflects the council's inquiry committee;will help everyone

Romilda Crocamo advised the Board vote on it and send to the Election Inquiry Committee  
Mike Butera echoed Romilda Crocamo's advise

Motion to adopt the directives made by Denise Williams 2nd Rick Nardone Audrey Serniak yes,  
Missy Thomas yes, Rick Nardone yes, Kathy Roth yes, Denis Williams yes, unanimous motion  
carries

Denise Williams will forward to the chair of the Election Inquiry Committee

#### JULY MEETING

Keep the 8/11/2021 meeting, delete 8/25/2021, add either 7/7/2021 or 7/14/2021

Audrey Serniak-fine with her;better to get updates on all that's being worked on  
Missy Thomas and Kathy Roth aren't opposed; 7/14/2021 at 5 PM is fine

Next meeting is July 14, 2021 at 5 PM; legal notice is required.

#### IN PERSON MEETINGS

Where? Hybrid? Romilda Crocamo will look into it.

#### BOARD COMMENTS

Rick Nardone-Commenting on complaints about Dominion, he said the other systems have  
issues as well. If you dump Dominion, where do you go from there? How do you do paper  
(13,000 paper ballots) when human error is worse than the machine problems. Need to make sure  
the machines are deployed properly (there's no internet connection). Can't do a hand count.  
Appreciate all of the good suggestions regarding Board authority, but can't solve all of the issues  
immediately. The Board needs the resources to improve and restore confidence.

Denise Williams-The system has a paper trail and is audited; there is no internet connection.  
Machines calculate and report faster than a manual count. The ballot marking devices eliminate  
over votes and advise, as a courtesy, of under votes. They guide the voter through and the ballot  
can be reviewed. This is only the second time these machines have been fully used. The poll  
workers are getting familiar with the machines. Feels proposed directives will help

#### PUBLIC COMMENTS (4 minutes)

Walter Griffith-Hopes and encourages a joint session with county council regarding Dominion  
machines (\$3.6 million); people have no confidence with the machines, staff and Bureau, people  
have the right to have confidence in elections. Need a joint session with Council. Says we have a  
great Board and need to actually do the work. Hybrid meetings are available.

Sean Donahue-Get rid of Face Book which is free; doesn't want to spend money on a web page. Paper ballots worked well for his grandfather;. Says someone on the Board smirks. The Board and Bureau have worked together when the past elections have been screwed up. He suggests we go to the courts for problem solving-set up an election court to avoid having to file under the election code . Presidential judge can set this up. Pointed out that in some races one vote counted and in others 5 votes were scattered.

Mark Rabo, Hazleton-Bewildered about something said about the directives-Office of Law only gives opinions on legal matters. The Board was asked if they had the time to serve; it's easy to read the election code. If directives over rule the charter or state constitution that is a problem.. Read the election laws and apply them. Drop box pulled 1 PM; too early.  
Rick Nardone-because we us Office of Law as a resource doesn't mean we rely on them for the decision. Denise Williams-did not ask Office of Law for guidance on the directives.

Dr. Richard Stanis, Plains-Never been involved with politics until recently. Has listened to Board meetings and PA election reform meetings (Seth Roe chairs) and focuses on the big picture. Volunteered as a poll watcher. Not happy with what he observed but wants to focus on future, There is no internet connection but not all the machines were pretested in the county. Counties are responsible for testing the machines and no one is checking them. There is no way to know if the machines are reliable so we can't have faith in the integrity of the results.

#### MOTION TO ADJOURN

Missy Thomas 2nd Kathy Roth unanimous

#### NEXT MEETING

July 14, 2021 5 PM

ADJOURNED 8:05 PM

### **Overview of Board of Elections & Registration**

The Luzerne County Board of Elections and Registration shall have and exercise all powers and duties stated in Section 8.04 of the Luzerne County Home Rule Charter and, shall provide general supervision over all elections conducted by the County in accordance with the Pennsylvania State Bureau of Commissions, Elections and Legislation.

In accordance with Section 8.04 of the Home Rule Charter for Luzerne County, the Board of Elections and Registration is comprised of five registered voters. Four of the members are appointed by resolution of County Council and the fifth member is appointed by an affirmative vote of those four members. At the time of their appointment, each member of the Board of Elections and Registration appointed by County Council, shall have been a member of the same political party continuously for at least five years and shall remain a member of that party during his/her term of office.

If any member of the Board of Elections and Registration files a petition for nomination or election or becomes a candidate for any elective public office, his/her position shall become vacant, and the vacancy shall be filled by County Council within 60 days after the declaration of the vacancy.

Any three members of the Board of Elections and Registration shall constitute a quorum and shall have the power to perform the functions of the Board of Elections and Registration.

The Board of Elections and Registration adopt and publish a meeting schedule, prior to every calendar year. You can find the meeting schedule above.

**LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATIONS**

**AGENDA**

**VIDEO/TELECONFERENCE VIA ZOOM - June 16, 2021 at 6:00 P.M.**

**CALL TO ORDER**

**PLEDGE OF ALLEGIANCE**

**ROLL CALL**

**ADDITIONS TO/DELETIONS FROM AGENDA**

**APPROVAL OF AGENDA**

**PUBLIC COMMENT ON AGENDA ITEMS**

This is an opportunity for members of the public to address the Board on matters listed on the Agenda. (limited to 4 minutes & one comment time per person) Please refer to the Board of Elections and Registration Online page of County's Website at <https://www.luzernecounty.org/1082/Board-of-Elections-and-Registration> for more information on how to participate in Public Comment via technology.

**APPROVAL OF MEETING MINUTES** (From: May 12, 2021 Election & Adjudication Minutes From May 18, 2021 to June 3, 2021, Meeting, May 24, 2021 Meeting, June 4, 2021 Special Meeting, & June 7, 2021 Special Meeting )

**AGENDA ITEMS - SOLICITOR**

**AGENDA ITEMS - BUREAU OF ELECTION**

1. Primary Election Drop Box Use Review: Dropbox ballot totals

# Attachment 6

## **AGENDA ITEMS - BOARD OF ELECTIONS & REGISTRATION**

1. Certification of Rest of May 2021 Primary Election (All)
2. State Ethics Committee Response to Inquiry by Chairperson Williams Regarding Concerns Voiced by Public of Possible Conflict of Interest with Volunteer Work With Fair Districts PA While Being a Member of the Board of Elections (DW)
3. Board of Elections & Registration FaceBook Page (AS)
4. Updated Website Overview of Board of Elections & Registration (DW)- (see attached proposed update p. 28)
5. Directives to Bureau of Elections (DW) (See proposed directives attached - p. 29)
6. Addition of July Board of Election Meeting? (DW)
7. Return to In-Person Meetings (DW)

## **PUBLIC COMMENT ON NON-AGENDA ITEMS**

This is an opportunity for members of the public to address the Board on matters not listed on the Agenda but which must be within the subject matter jurisdiction of the Board. Please refer to the Board of Elections and Registration Online page of County's Website at <https://www.luzernecounty.org/1082/Board-of-Elections-and-Registration> for more information on how to participate in Public Comment via technology.

## **MOTION TO ADJOURN**

## **ADJOURNMENT**



**LUZERNE COUNTY BOARD OF ELECTIONS  
AND REGISTRATION MEETING MINUTES  
May 12, 2021**

CALL TO ORDER 5:01 PM

PLEDGE OF ALLEGIANCE

ROLL CALL

Kathy Roth present, Richard Nardone present, Audrey Serniak present, Missy Thomas absent, Denise Williams present

EXECUTIVE SESSION

Romilda Crocamo reported the Board went into executive session from 5:05 PM until 5:28 PM to discuss potential litigation resulting from county council's resolution; there were no deliberations.

APPROVAL OF AGENDA

Additions to the agenda: discuss/vote on meeting date to certify the election and discuss/vote on returning to in person meetings

Motion to change/accept the agenda Audrey Serniak 2nd Rick Nardone, motion carries

PUBLIC COMMENT (4 minutes)

David Bond, Trucksville (Kingston Twp)-his financial filing wasn't received on time and he has been fined \$20. Bob Morgan advised the deadline was close of business Friday. Romilda Crocamo will check to see if it can be waived.

MINUTES

Motion to accept minutes April 28, 2021 by Kathy Roth 2nd Rick Nardone, motion carries

SOLICITOR'S REPORT

Romilda Crocamo and Mike Butera reported working with the Department of State to complete Judicial Watch's request to purge of the voters registration lists within 90 days. The list is regularly purged on an individual basis if people do not vote in two consecutive federal elections, for death, etc. This will happen after the primary; notice will be sent to last known address and people can reregister. Last wholesale purge was around 2012.

The Office of Law is working with the Bureau on the primary and Board members can assist.

#### BUREAU OF ELECTIONS REPORT

Motion to change the drop box location from Pittston City Hall to Pittston Library (to avoid the appearance of influence) made by Kathy Roth 2nd Audrey Serniak, motion carries

Motion to accept the Proclamation made by Rick Nardone 2nd Kathy Roth, motion carries

Bob Morgan reported that preparation for the primary is ongoing and the machines are ready and are being delivered to the polls. There was a glitch with a small number return envelopes made by the vendor; some are going to Mercer County. Mercer County has been contacted and any ballots received there will be date stamped and overnighted to Luzerne County at the vendor's cost. Voters can use the Luzerne County drop boxes or come to the Bureau for a new return envelope. The first batch was about 19,000 ballots and the glitch occurred in one of the subsequent smaller batches. There are about 22,600-22,800 total mail-in ballots going out.

#### BOARD OF ELECTIONS REPORT

#### PUBLIC COMMENTS ON AGENDA ITEMS AT THE START AND ADDITIONAL PUBLIC COMMENTS AT THE END OF MEETINGS CONCERNING BOARD MATTERS (4 minutes)

Rick Nardone says that makes sense; Denise Williams said it allows a public interface and an opportunity to bring up matters that weren't foreseen.

Motion to accept by Kathy Roth 2nd Rick Nardone, Roll call: Rick Nardone yes, Kathy Roth yes, Audrey Serniak yes, Denise Williams yes; unanimous, motions carries

#### OVERVIEW OF THE BOARD ON THE WEBSITE

Romilda Crocamo said the current overview was written by a previous director (Marisa Crispell) when the new website was constructed. The Board can draft its own overview, have it reviewed by the Office of Law, and have it posted.

#### POLICY FOR WRITE-IN VOTES

Audrey Serniak explained that in the 2020 primary, the Board started by counting most of the write-ins but because of time constraints began to 'scatter' non-viable candidates. In the 2020 general, the Board 'scattered' non-viable candidates from start to finish. Mike Butera verified Audrey Serniak's account; feels we need to count where there are no candidates and can 'scatter' non-viable where there are candidates on the ballot. Denise Williams said it's scatter where you must and write-in where you can, there's a time crunch. Audrey Serniak said there needs to be at least 3 Board members present and that other support people need to be considered.

## CURING MAIL-IN BALLOTS

Opportunity for curing mail-in ballots. Approximately 120 voters were given the chance to cure their 'naked' ballots in the November 2020 election per state guidance received the night before.

There are other ballots received that may or may not be able to be cured: no outer envelope, outer envelope not signed and/or dated, damaged in the mail,. There are not a great number of these. Bob Morgan was able to 'reconstruct' enough of one damaged ballot to send the voter a new ballot. Paula Radick stated that on election day at 7 AM, ballots with problems were set aside for later adjudication.

Audrey Serniak said the process for curing 'naked' ballots in November 2020 as for the Board members to compile a lists of the names, addresses and serial numbers, and then exchange and proof- read each other's lists. The Office of Law gave the lists to the Bureau to update the SURE system and the party representatives to contact the voters. The process was halted when it was deemed there was not enough time for a voter to be notified and get into line at the poll. The process isn't equitable because only 'naked' ballot voters who live in municipalities named at the beginning of the alphabet had an opportunity to cure.

Richard Nardone's main concern was the best use of the Bureau's time and resources. Denise Williams said under the law the Bureau can assist voters to cure and that she was concerned with the best interest of the voters. Pointed out that people are assisted throughout the entire process and therefore can be assisted with curing.

Bob Morgan advised that there aren't enough resources to cure some types of ballots. Paula Radick and Romilda Crocamo mentioned security issues in curing the ballots.

Kathy Roth said that since the process was not equal for everyone, we should not cure these ballots.

Audrey Serniak said she was torn because the curing process was inequitable but she would like to allow as many people as possible to vote. While not suggesting that the primary election isn't important, and since the ballots are already being prepared for canvassing, perhaps a process for curing some of the ballots in other categories can be developed for the 2021 general election.

Motion: The Board of Elections will offer an opportunity for citizens to cure their mail in ballots on Election Day to the extent possible as determined by a majority of the Board present.

Motion made by Denise Williams 2nd Audrey Serniak; Roll call Kathy Roth no, Audrey Serniak yes, Rick Nardone yes, Denise Williams yes; 3 yes, 1 no, motion carries.

## SCHEDULE FOR BOARD MEMBERS

Three members need to be present 7 AM-8PM on Election Day, more if possible.  
In addition at least 3 members need to be present to count write-ins and adjudicate ballots in the

days following. Rick Nardone will keep track of the schedule.

#### DISCUSSION OF IN PERSON MEETINGS

Audrey Serniak said she has no problem with in-person meetings but really wants a hybrid option. Hybrid was determined to be Board members and anyone else present at a meeting location with a call-in option available for the public. More information is needed.

MEETING TO CERTIFY-To-be-determined; deadline to certify is June 7, 2021  
PUBLIC COMMENT (4 minutes)

Claudia Glennan, Salem Twp-The local campaign finance reports are not posted yet. Bob Morgan advised that part of the project will be done after the primary. Claudia Glennan offered to assist if allowed.

#### NEXT MEETING

A Special meeting will be scheduled to discuss/vote on certifying the election.

Next regular meeting will be June 16, 2021 at 5 PM

#### MOTION TO ADJOURN

Motion to adjourn Rick Nardone 2nd Kathy Roth, motion carries

ADJOURNED 7:32 PM

#### BOARD OF ELECTION AND REGISTRATION NOTES

**FROM THE PRIMARY ELECTION**

**AND ADJUDICATION**

**MAY 18 – JUNE 3, 2021**

**PRIMARY ELECTION MAY 18, 2021**

Called to order pre-canvassing 8:06 AM, Denise Williams, Kathy Roth and Audrey Serniak present.

Instructions to the workers given by Mauro Di Mauro.

Judge Hughes swore in the workers at 8:30 AM.

Rick Nardone arrived. Curing of the 'naked' ballots began around 9:30 AM. It was decided to have lists available for the parties at 11 AM, 3 PM and 6 PM. Republican, Democratic, Libertarian and Green party representatives were contacted. Kathy Roth left.

Lunch break at 12:00 PM. Returned at 1:00 PM. Denise Williams, Rick Nardone and Audrey Serniak present.

Pre-canvassing continued; curing process for 'naked' ballots continued. The Board was advised of the court action taking place regarding the mislabeling of Republican ballots by vote casting machines. The issue was resolved with people being allowed to vote by machine, use an emergency or a provisional ballot.

The mail-in ballots were all processed by 4:30 PM except for the ballots in the Penn Place drop box. County workers were dismissed. Final pick up for that box was scheduled for poll closing at 8 PM.

Denise Williams and Rick Nardone left; Audrey Serniak repaired to the Bureau until approximately 5:30 PM.

All Board members were present at the Bureau by 7:15 PM. Canvassing began at 8 PM with Kathy Roth, Rick Nardone, Missy Thomas and Audrey Serniak observing the final processing of mail-in ballots from the Penn Place drop box. Denise Williams remained at the Bureau.

At about 8:30 PM the Board went down stairs to observe the return of some of the polling materials and all but Audrey Serniak departed. Audrey Serniak remained at the Bureau and the public viewing room until approximately 11:40 PM. She was advised at that time that the remaining precinct materials had been returned and the final results for the night were being reported.

**BOARD OF ELECTION AND REGISTRATION NOTES**

## **ADJUDICATION**

**MAY 21 – JUNE 3, 2021**

**MAY 21, 2021**

Training began at 1:06 PM Denise Williams, Kathy Roth, Rick Nardone and Audrey Serniak present

Board decided to open training up to the public; Training was on the system used to count write-ins and on adjudicating other situations; training done by Dominion and Mauro Di Mauro.

Adjudication began at 1:44 PM

The Board decided to accept ballots with markings on the privacy envelope.

There were 29 ballots that did not go through the scanner (torn? white-out? crumpled?) and had to be transposed by the non-partisan transposing team (one called out votes and one marked the ballot) The Board decided they did not have to review each ballot and they could go directly to the team

There were about 42 ballots that the people opening on election day put aside for the Board to examine; with most the privacy envelope wasn't sealed; some were opened and resealed by the voter, notes enclosed. All were accepted by the Board; they were opened, mixed and scanned by the Bureau.

About 10 envelopes had other issues-no signatures on outer envelopes, mangled envelopes, non-standard envelopes. Depending on the situation they were rejected, accepted and a couple were transposed.

Ballots from polling places- Emergency or provisional ballots voted because of the machine header error, Board determined that it was ok to scan these ballots.

Military ballots were all transposed.

One judge of elections did not scan a group of ballots because of the bad header; there were emergency ballots with the affirmation; Board decided to scan these

Provisional ballots (300+) 3:05 PM

Ballot label error, requested mail-in but did not vote it, third party/independent-not in poll book. Verified that 3 members need to review the provisional ballots individually

Kathy Roth left 4:30 PM

Two non-affiliated voters voted Republican ballots; voided; one referred to detectives

Board review completed 5:05 PM; scanning completed 5:10PM

**MAY 24, 2021**

9:08 AM Denise Williams, Kathy Roth, Audrey Serniak present.  
Rick Nardone in at 9:40 AM; Kathy Roth left 11:15 AM.

Names like Mickey Mouse, N/A and phrases were rejected-other. If there was an over vote in a race, the race was rejected not the entire ballot.

12:15-1:15 PM Lunch. Denise Williams, Rick Nardone, Audrey Serniak present.

Adjudications continued. Stopped at 3:30 PM.

Began with approximately 13,125 ballots; ended with 12,725 ballots

**MAY 25, 2021**

9:00 AM Denise Williams, Kathy Roth, Audrey Serniak present.

Using 3 screens with one Board member at each screen with Bureau assisting.  
Bureau employees will be sworn-in. (Judge Hughes swore in employees.)

During summer the Board will make plans for feedback from poll workers: surveys, focus groups. This will be a future agenda item.

Scattering names in statewide races where people are not confirmed candidates. The Board needs a report to begin scattering names in the smaller races.

Council Chair Tim McGlynn stopped by to observe and to offer the Board any assistance without overstepping because Council is separate.

Lunch 12:10 – 1:10 PM Denise Williams, Rick Nardone, Audrey Serniak present.

Adjudication continues.

4:36 PM Adjudication stops for the day. Started with 12,725, ended with 11,548 (215/hour)

**MAY 26, 2021**

9:00 AM Denise Williams, Rick Nardone, Audrey Serniak present. Kathy Roth joined at 9:45 PM.

Working with current procedure it is impossible to complete adjudication in time to meet the certification deadline.

Discussed with Romilda Crocamo and Mauro DiMauro (phone) obtaining more machine stations and the county workers needed to do the clerical work on them. Requesting Dominion send more equipment so that additional stations can be set-up. David Pedri and Dave Parsnik will get the Board the resources needed- 8 stations, 16 workers (training 5/27/2021).

One station not working; on other station two input screens sharing one tech worker.

12:00-1:00 PM Lunch Denise Williams, Rick Nardone, Audrey Serniak present.

4:36 PM

Adjudication stops for the day. Public still present.

Two motions discussed to further expedite the process:

Going forward, in races where candidates appear on the ballot, the Board will scatter names when the total number of write in votes in that race will not impact the outcome of that race.

Motion made by Rick Nardone 2nd Audrey Serniak Unanimous, motion carries.

Going forward, in races where no candidates appear on the ballot, the Board will scatter names when the total number of write in votes in that race does not equal or exceed the number required to be on the ballot in that race.

Motion made by Rick Nardone 2nd Audrey Serniak Unanimous, motion carries.

Started with 11,548 ballots, ended with 10,537 (204/hour)

5:00 PM Day's work ends.

## **MAY 27, 2021**

9:00 AM Denise Williams, Rick Nardone, Audrey Serniak present.

Audrey Serniak read the two motion passed on May 26, 2021 (see above).



Report reviewed to determine which names in the different races could be scattered and the inputting to expedite that process was begun. Denise Williams, assisted by other Board members, trained county workers (all workers have been sworn in by Judge Hughes). Additional equipment which the county had was set up so that 2 people could work on the ballot and share a tech person who would enter any names needed.

12:00-1:00 PM Lunch Denise Williams, Rick Nardone, Audrey Serniak present.

Work continued and stopped at 4:14 PM

4:15-4:24 PM Executive Session to discuss inquiry, possible litigation.

Started with 10,537 ballots, ended with 8779 (320/hour)

## **MAY 28, 2021**

9:00 AM Denise Williams, Rick Nardone, Audrey Serniak present.

Since Dominion shipment has been delayed, discussed continuing on Saturday at 8:00 AM. Discussed tentative certification meeting for 5PM on Friday, June 4, 2021, possibly as a hybrid.

Adjudication continued.

Writing in and choosing the same candidate in a race, reject the write in vote. If there is an over vote, negate the race but not the entire ballot.

12:00 -1:00 PM Lunch Denise Williams, Kathy Roth, Audrey Serniak present.

The pace is fast enough not to work on Saturday. Will resume at 8:00 AM on Tuesday, June 1, 2021 and go until 6:00 PM. The certification meeting still must be held by Zoom.

4:20 PM Worked stopped for the day.

Started with 8779 ballots, ended with 6421 (390/hour)

## **JUNE 1, 2021**

8: AM Denise Williams, Kathy Roth, and Audrey Serniak present

Adjudication continues

11:45 AM Kathy Roth left; anything requiring a Board decision will be quarantined.

12:30- 12:55 PM Lunch; Denise Williams and Audrey Serniak present

3:25 PM

Wilkes Barre Twp Ward 2; issue with Democrat and Republican ballots in township council, judge of elections and inspector of elections races; system indicates there are write in votes but there are no write in names; quarantined with label "BMD" issue

Started adjudicating mail in ballots

6 PM Stopped for the day Started with 6421 ballots, ended with 2211 (390/hour)

## **JUNE 2, 2021**

8:15 AM Denise Williams, Kathy Roth and Audrey Serniak present

Adjudication continues

9:20-9:35 AM – Executive Meeting to discuss compliance. Discussed need to change certification meeting to June 4, 2021 9:00 AM to comply with state's change of certification deadline for the special election State Senate 22 to June 4, 2021 12:00 PM.

12:00 PM Kathy Roth left; anything requiring Board decision quarantined

12:30-1:10 PM Lunch Denise Williams, Rick Nardone and Audrey Serniak present

Adjudicated errors and previously quarantined ballot except for Wilkes Barre Twp

Started with 2211 ballots, ended with 107 in quarantine from Wilkes Barre Twp #2

3:40 PM 152 machine ballots from Wilkes Barre Twp Ward 2 need to be hand counted

4:00 PM

Ballots retrieved.

A spreadsheet was created to verify the number of ballots between the regular ballots and the ones the scanner judged needing write in adjudication

The procedure was agreed to by the DA's office and the parties.

There were two team counting: Dave Parsnik tallied while AJ Evanoski and Denise Williams read aloud the ballots and Rick Nardone tallied while Bob Morgan and Audrey Serniak read aloud the ballots; Mauro DiMauro entered the tallies observed by Audrey Serniak

9:00 PM

Hand count concluded: 7 people X 5 hours = 35 staff hours

Adjudication complete.

**JUNE 3, 2021**

10:00 AM Rick Nardone and Audrey Serniak attended the 2% state mandated audit.

Obtained reports; scanned the ballots; obtained that report and compared results from both reports.

Bob Morgan picked two batches of mail in ballots that contained more than 50 ballots apiece and 4 wards, one of which took part in the special election for district 22 senator; balance of rural/and more populated areas.

Batch 6 and batch 83; Pittston Twp #1 (special senate election), Dallas #1, Harveys Lake Borough, and Butler Twp #5 (two ballot bags and 2 tape) (approximately 1650 total ballots)

The Office of Law said that it is advisable to do a recount of Swoyersville #1 as part of the 2% audit because all the resources and a Board quorum were present today. Mike Butera arranged with petitioner to add this count to the audit.

3:10-4:00 PM

Went to courtroom to continue the audit with the hand count of Swoyersville #1 Borough Council race, both Democratic and Republican ballots were counted. Mark Anthony Nemichak was concerned that some his the write-ins may not have cumulated. Denise Williams pointed out that a vote for 'Andrew Christiam' was incorrectly tallied with 'Adam Christian'. With this correction there was no change in the vote.

Two teams: Rick Nardone Bob Morgan Audrey Serniak and Denise Williams Eryn Harvey AJ Evanoski; candidate was satisfied with result.

Rick Nardone compared the reports. Denise Williams joined and agreed with Rick Nardone and Audrey Serniak that more than 2% of the statutory requirement was complete.

Ballots/hour are approximate

Started with 13,125

End of Day /hour

5/24 12,725 80  
5/25 11,548 215  
5/26 10,533 202  
5/27 8779 320  
5/28 6421 390  
6/1 2211 450  
6/2 1078 410

**LUZERNE COUNTY BOARD OF ELECTIONS  
AND REGISTRATIONS SPECIAL MEETING  
MINUTES May 24, 2021**

CALL TO ORDER 6:00 PM

PLEDGE OF ALLIGENCE

ROLL CALL

Richard Nardone here, Kathy Roth, here, , Audrey Serniak here, Missy Thomas here,  
Denise Williams here

APPROVAL OF AGENDA

Motion to adopt Missy Thomas 2nd Kathy Roth, unanimous, motion carries

PUBLIC COMMENTS (4 minutes)

Denise Williams- Thanked everyone for coming. Order of business: first public comment on the mislabeled header; then statements from Dominion, the Bureau and Management. There will be a Q&A session with questions from the Board and then submitted questions, There will be a final public comment session that can apply to additional issues.

Walter Griffith, Kingston Twp-This meeting is an important forum and counting the write in ballots a major task. Saw the Democratic header on the machine; voted the Republican candidates; printed out Republican; took pictures at all stages; scanned his ballot. Regarding the Republican/Democratic header error, at whose direction was the header done? A forensic audit should be done at Dominion's expense. Were the machines tested after they were programmed? Romilda Crocamo advised machines can't be opened after they are locked.

Ronald Knapp, Nanticoke-Ballot counting an epic work load; there's a 50 vote difference for one of the nominees. We need a forensic audit. The header problem disenfranchised people. It was a blatant mistake.

Linda Houck, Dallas-Meeting is the proper response to provide information to voters.

Sheila Saidman, Kingston-Were the machines tested after they were put in the polling locations?  
Can the Board check them?

Justin Beherns, Wright Twp, Republican County Chairman-Saw the Dem header when voted, like Mr. Griffith, This comes down to a bigger issue of of Republican disenfranchisement and a lack of trust in the election process. How do we regain trust? A lot of people effected by this error.

Kendra Radle, Exeter-Vital. Header Dem, machine printed out the Republican ballot. What happens if no one shows up to the public L&A testing?

Jeff Josaway(?), Lehman Twp-Republican machine but didn't check his ballot; there were 3 broken printers,. Pre-testing needed. Dominion is covering; middle of national controversy.

Jim Bognet, Hazle Twp-7:25 AM machines not working, voters turned away, Democratic header all hurt the process. Did the Bureau check the machines? Is it Dominion's fault? Training needed. Republicans feel the election is rigged. Bob Morgan should resign or be terminated.

Evelyn Conahan, Hanover Twp- Wanted to know what the bar code on the ballot was and how the ballot should be placed in the scanner.

Bob Fisher, Salem Twp-Republican machine, Democratic header with Republican candidates, ballot printed out correctly. How do you place ballot in the scanner; can scanners be manipulated? Dominion has no integrity across the country. Go to a paper ballot.

Matthew Barr, Fairview Twp-Same experience; where was error made? Audit? Go back to paper.

Stephen Urban, Wilkes Barre-Ward 9, echoes regarding the header. Travesty. Wants and over/under report. Republican voted a Democratic ballot; Republicans disenfranchised; who is custodian of machines? Will be all over the Board and the Office of Law. All management should resign.

Dino Manotti, Wilkes Barre-Ward 2-Republican header; get rid of Dominion because errors keep building up.

Barr Herring, Duryea-(Chat) wants to see Dominion contract.

#### DOMINION STATEMENT

Nicole Nillette-The certified 2019 election from Luzerne County was subjected to many audits; there is a paper trail. This was a data entry error on the touch screen and only on the ballot marking devices; the paper printed out correctly. Human error; regrets the error; there was minimal impact to the election and none to the tallies. Going forward there will be attention to detail in the proofing process, procedures and communications with Luzerne County. No one wants these typographical errors to occur.

Dan Hastings-Regarding reimbursement, our error and will address the money.

#### BUREAU OF ELECTIONS

Bob Morgan, Director-Scope was determined to be the header. The 186 Judges of Election and media were informed with instructions of what to do. There was no impact to the vote. We can dispense with the cover page. We have the proper ballots with a paper trail. We held numerous training sessions. It doesn't matter how the ballots are positioned to be scanned, they will be read by the machine. This was our largest ballot in 4 years with a lot of moving parts. Do our highest quality work desire not to have this happen again.

## COUNTY MANAGEMENT

David Parsnik-Has a partnership with Dominion; used same process as before. We give them the ballots and they program. Human error. There were 17,000 mail in ballots, 36,000 machine ballots, 500 provisional. We can do audits; will check with Dominion to do additional proofing. The Bureau worked hard and completed the project ; but, will learn from this and move forward.

## BOARD OF ELECTION QUESTIONS

Rick Nardone to Dominion-Has this specific type of data entry error occurred before? Yes. Are these tracked? Yes, glean information and use it to improve operating procedures.. Are certain errors more frequent and do you categorize errors? Programming, human, machine errors? There is an after actions report that is in partnership with customers.

For Dave Parsnik-How far ahead are things reviewed? A week to a week and a half. L&A testing 2 weeks before election. Printers jamming, tablets not working; problems were addressed. How many people involved? Just Dave Parsnik and Dominion; Dave Parsnik is familiar with the warehouse and works with the vendors. Bureau has other tasks. Pieces of equipment? 710 tablets, 220+ scanners that have to be programmed and ready to go. Look at a sampling and the machines are transported. Could be failure between warehouse and polling place.

For Bob Morgan-Rick voted in Slocum Twp; the poll workers were great but didn't have the right explanations. How quickly was the correct information transmitted? At 7:30 AM they were diagnosing the problem. Then calling the judges of elections and advising provisional or emergency ballots or by machine; suggested posting a sign; the information was posted to the county website and given to the media.

To Eryn Harvey-to questions Eryn responded there are 5 poll workers per 186 polling places for just under 1000 workers. Bob Morgan-there were 34 training sessions over 3 weeks; 1 ½ hours for poll books and 2 ½ for machines and judges of elections. There are 6 full time employees in the Bureau. On election day there are 1006 plus 30 for mail in votes.

To Dave Parsnik and Nicole Nillette- characterize working relationship-good.

Missy Thomas-to Dominion (Nicole, Dominion)-Voters have lost confidence in Dominion. Feels for the people who donate time to the election. We need to look at the resources we need.

Nicole for Dominion appreciate that in every election there is a 100% paper trail and that it doesn't get more transparent than that. Dominion has been a target of a disinformation campaign; Dominion doesn't lie; she and her family have been targeted.

Kathy Roth-Are there any online connections? No, never online; errors not corrected on site.

Rick Nardone Worried about the impact to the community that an audit can't overcome. Can an outside audit be funded by Dominion? Denise (Williams) is captain of the Titanic.

Missy Thomas feels all credibility lost and we will not get volunteers we need for future elections.

Audrey Serniak-All the voters and the workers are being effected. Workers take ownership of the election and there is a lot of competence in the county. People see only the tip of the iceberg.

Bob Morgan-This was the largest election with 186 polling places, 576 separate ballots, 1932 races. The error appeared county wide and he and Nicole agreed that coding error and human error were the same thing.

Denise Williams-for Nicole (Dominion)-Does Dominion do the Logic and Accuracy test on their own or is Luzerne part of it? Dominion says it's a partnership. Dave Parsnik says that the county is limited because Dominion programs and tests each machine; the county relies on Dominion. Does the county do a test run? Dave Parsnik-No. There is an advertised test for the public that was done on 5/12/2021; no one came. Vote on a machine programmed for the election is printed and scanned; for the current election the mock election was not run because no one from the public was there. Dave Parsnik was not aware of the Republican header problem until election day. Denise feels it is not completely Dominion's fault and could have been caught at our end. Rick Nardone-Board needs to have a discussion regarding audit, contributing factors and, for November election, our limited resources. Listen to contributing factors, analyze and come up with recommendations and solutions in a cooperative manner for the November election.

## PUBLIC'S QUESTIONS

Previously submitted and read by Denise Williams

Why not stop to fix the problem? Dominion-Voters were given options to vote

Do Dominion machines use Smartmaker? No, that's a competitor; Dominion uses Dominion.

Any connection to George Soros? Dominion majority owned; doesn't know the minority owners

Did Mr. Morgan test the ballots? Bob Morgan did not review or test the ballots. Dave Parsnik advised he has added to his check list.



To Dominion-In Fayette County there was a bar code problem. Dominion-won't discuss other customers. See Dominion's website [dominionvoting.com](http://dominionvoting.com) for that information. Human error caused Luzerne's error.

Dominion- Going forward, a lot can be done differently; committed to improving the process. Dave Parsnik-no one is as hard on himself as he is; will assign an IT person to work with Dominion.

Denise Williams-How does Dominion expect to regain the trust of Republican voters? Humbled by data entry errors; we will address the header issue and reply to other questions in writing.

#### PUBLIC COMMENTS (4 minutes)

Ronald Knapp-Thanked the Board; address training; there was an interface issue with the poll books; judge of elections refused to seek assistance from IT; delayed opening of poll; had workers taking the ballots from the printer and scanning them in.; took his liberty away. For training there should be dry run with DNC and RNC observers. The write in process is overwhelming.

All concerns and complaints are being addressed and looked into; solicitors are doing this.

Walter Griffith-Apologizing for abrasive remarks, blame is on the county. Lots of excuses. Test the machines. Primary is a disaster. Dominion is condescending and disenfranchised Republicans. Go to paper ballots. Do something different. Dominion is taking a hands off approach. Dave Parsnik and Bob Morgan should resign; Dave Pedri already resigned. No excuse regarding public test error should have been caught by paid county employees.

Claudia Glennan, Salem Twp-Thanked the Board; survived the flogging tonight; Board doing the right thing. No one was disenfranchised; there were ways to vote. Sure that if situation was reversed there would have been just as much comments. Avoid conspiracy theories.

Rick Jones, Swoyersville-We need to vet the process and find the exact cause. Need better training. Better ways to communicate information to the poll workers. Polls not opened on time. He was left off the published proclamation. Bob Morgan took responsibility, there is no recourse for this error. Experience did not go smoothly.

Sean Donahue-Dave Parsnik assured us that write ins will be counted but we are scattering. We need a referendum question to go to paper ballots. Wants to know the interest of the person that did the clerical error. Was it done on purpose?

Steve Urban-Who proofed the ballots on our part? It's a haphazard process with too much outsourcing as county can provide resources. There should be better training. Poll workers will not return. We need a housecleaning; it's good that Pedri left. Wants and under/over report.

Throw out the election and start over with paper. Bought a bad system; went against the Board on this. Chaotic.

Charlie Jones, Swoyersville Ward 2-What does the Bureau do? Issues at the polls. Support not there. Phone calls went to voice mail, hung up, not picked up. No training to roving IT person; was handed a manual. Instructions not adequate. Other polling place was helpful. Constable not on the ballot. Bob Morgan not taking responsibility.

Leo, Jenkins Twp-Agrees with everyone; this was embarrassing. Poll workers were great. Voters are angry. If the Board can't handle they should step down should step down.

Justin Behrens-Many Republicans didn't vote because of frustration and anger. Calling on the Board for decisions because we have the power. Had been called previously about the L&A test and wasn't this time. Thanked the poll workers; they did an amazing job.. Dominion treated us badly.

Linda Houk-Understands the anger but anger directed at the Board is misplaced. Thanked the Board for stepping up. A goal of Home Rule is to do the best we can do. Are we doing the best we can do? The Inquiry Committee has not disbanded. Some of the improvements have been implemented and some haven't. They are reconvening and ask the Board be partners.

Bob Bognet-Dominion and the Bureau are paid; ditch Dominion; paper trail is not the issue, bad header was the question. Bob Morgan did not do a screen test and is not qualified; he worked for Matt Cartwright and this creates an impression of a conflict of interest. we need a fresh start.

Sheila Saidman-reiterated what Linda Houk said regarding Inquiry Committee. Mail ins did not seem to be a problem; doesn't see why Bob Morgan previously working for Matt Cartwright is a problem and is a terrible allegation; agreed that a lot of people left without voting because of header; this was a significant issue.

Jason Carr, Saylorsburg-Voted in Monroe County; signed in at poll book and obtained a paper ballot, filled it out and fed it into the tabulator-seamless. Voters should through out the corruption.

Brian Shiner, Kingston-Consolidation of what we have already heard. An audit will confirm the results but will not show how many walked away or didn't go; learn and move on.

Denise Williams thanked everyone for coming and participating. Speaking for herself, she is cooperating with the Bureau and the Election Inquiry Committee to improve all aspects of the elections and encourages the other Board members to do the same.

Audrey Serniak-Come out and watch us process the write ins.

NEXT MEETING

Continuing to process ballots; there will be a certification meeting; next regular meeting June 16, 2021

Thanked all for participating; gave information to view adjudicating.

MOTION TO ADJOURN

Motion to adjourn Kathy Roth 2nd Rick Nardone unanimous

ADJOURNED 8:37 PM

**LUZERNE COUNTY BOARD OF ELECTIONS  
AND REGISTRATION SPECIAL MEETING  
MINUTES JUNE 4, 2021**

CALL TO ORDER 9:00 AM

EXECUTIVE SESSIONS

May 27, 2021 4:15- 4:24 PM-Discussion of DA investigation and compliance.

June 2, 2021 8:57-9:15 AM – Discussed DA investigation and compliance

Denise Williams explained the change in meeting was to comply with the State's change in deadline for certification of the State Senate District 22 race.

PLEDGE OF ALLEGIANCE

ROLL CALL

Richard Nardone here, Kathy Roth here, Audrey Serniak here, Missy Thomas absent, Denise Williams here

APPROVAL OF AGENDA

Motion to amend the agenda to certify only the special election for state senate district 22  
Rick Nardone 2nd Kathy Roth unanimous, motion carries

PUBLIC COMMENTS (4 minutes)

Ronald Knapp, Nanticoke- re: Special Election Senate District 22, wants to verify remainder of election and specifically his race is not part of this meeting. Mike Butera verified only Special Election will be certified at this meeting.

Arlene Lange, Hanover Twp-went to the polls with her mother; there was a gap in the scammer count between her vote (53 or 54) and her mother's immediately after her (57). Why the gap? Office of Law advised her to send and email with concerns.

#### AGENDA ITEM-SPECIAL ELECTION

Motion to certify Special Election Senate District 22 Rick Nardone 2nd Audrey Serniak  
Audrey Serniak yes, Rick Nardone yes, Kathy Roth yes, Denise Williams yes  
Motion carries, special election certified

#### PUBLIC COMMENTS (4 minutes)

Ronald Knapp, Nanticoke-reference 'under God' from the pledge and read an inspirational piece. Wants to see justice from the debacle that transpired, to find out what happened. Asks that certification be delayed a month, to check with the DA on his progress and then leave it to God. Demand a dry run for the general election.

Stephen Urban, Wilkes Barre-looked at results and wants additional reports, how many scattered votes per ward and the over/under report. Wants these reports published.

Matt Krone, Freeland Borough-unofficial results show scattered ballots. Will we find out the actual names? As a registered Republican he doesn't feel disenfranchised;election not perfect but issue over dramatized.

Sean Donahue, Larksville-Is the complaint system in place? People want to know who the write ins were. He wants a policy meeting so that if he doesn't agree he can go to county council for an ordinance. Why aren't the results posted a week ahead of time?

Brian Dwyer, Larksville-"I'm literally sitting here twitching" because people were disenfranchised. Had problem voting because registered non partisan. Doesn't know how election can be certified. Frustrated that we can't get a simple process right.

Hilary Palencar, Larksville-also 'twitching'. She's 64 years old with a health issue and had to return to the polls because she was not sure, after media reports and other info received that her vote may not have been counted. Very upset that she had to return to the polls. She also had trouble logging onto this meeting. (Brian Dwyer said he also had trouble logging on.)

Arlene Lange-Questioned whether all of the votes were counted and sent this to the Office of Law. Romilda Crocamo advised there is no evidence that votes cast were not counted.

Claudia Glennan-Had no problem signing on to the meeting. Not impugning what anyone else said. Is aware of the hours the Board is putting in and thanks us.

#### NEXT MEETING

Discussion regarding the timing of the next meeting on the certification of the election. A suggestion was made that this meeting be continued on Monday. After a point-of-order by Stephen Urban, who pointed out that the agenda had been amended, it was decided to adjourn this meeting and hold a Special Meeting on June 7, 2021 at 4:30 PM (court adjourns at that time).

#### MOTION TO ADJOURN

Kathy Roth 2nd Audrey Serniak unanimous

ADJOURNED 9:44 AM

**LUZERNE COUNTY BOARD OF ELECTIONS  
AND REGISTRATIONS SPECIAL MEETING  
MINUTES JUNE 7 2021**

CALL TO ORDER 4:31 PM

PLEDGE OF ALLIGENCE

ROLL CALL

Missy Thomas here, Richard Nardone, here, Kathy Roth here, Audrey Serniak here, Denise Williams here

APPROVAL OF AGENDA

Motion to amend the agenda to certify the statewide races (Justice of the Supreme Court, Judge of the Superior Court, Judge of the Commonwealth Court and Judge of Common Pleas Court 11th District ) and 4 statewide questions and postpone the county races due to revisions in some county races (NW Area School District Dem-tie, Borough Kingston Council Dem, West Wyoming Council Dem), allowing for review and legal filings. Races to be certified June 14,2021.

Motion Denise Williams 2nd Rick Nardone unanimous, motions carries.

PUBLIC COMMENTS (4 minutes)

Walter Griffith-Cite law that allows for piecemeal certification. Doesn't believe that election results can be certified while DA is investigating. Romilda Crocamo-She spoke to State Attorney John Hartzell regarding bifurcation of election June 14, 2021 is time for filing any challenges; Department of State supports and is a procedure used in other counties.

Bob Caruso-13,000+ voters took advantage of write ins in the many blank races; board scattered (4654 votes) if not enough write ins to win; this is shameful on the Board's part; they took an oath to uphold the democratic process;votes are secret, sacred and deserve to be counted; scattered should be used for jokes not living people; Board has good people but inexperienced;

this is a problem since the beginning of the Charter. Denise Williams-every vote was counted; just because they were scattered doesn't mean they weren't counted.

Sean Donahue-did Dominion machine show his name? Wants to know why his name didn't appear; he wrote his name in for all offices; not the Board's place to not record his name; he is legally able to vote for himself; (advised by Chair that comment should be on agenda item) don't certify the election.

#### AGENDA ITEM

Motion to certify Justice of the Supreme Court, Judge of the Superior Court, Judge of the Commonwealth Court and Judge of Common Pleas Court 11th District Luzerne and four ballot questions Audrey Serniak 2nd Rick Nardone

Roll call- Rick Nardone yes, Kathy Roth yes, Audrey Serniak yes, Missy Thomas abstain, Denise Williams yes 4 yes 1 abstain, motion carries

#### PUBLIC COMMENTS (4 minutes)

Ronald Knapp-a courtesy count was done for one candidate; he wants a recount because he is just 57 votes short of a county council nomination; proportionally he believes he was under counted; people want him in office; if courtesy recount is done for one it should be available to all.

Mike Butera responded-not a courtesy recount; there was a petition to recount in progress and he (Mr. Butera) arranged to have the recount be part of the 2% audit currently being conducted; the political parties, DA, public, candidates were all informed; there had been comments made at the polling place that called into question the vote; count was shown to be correct.

Ronald Knapp-feels this is a gray area, petition deadline had passed; Mike Butera-deadline had not passed; Ronald Knapp-we're taking a hammer and chisel to our democracy; needs to be equal and fair; feels he can make up the 57 votes; Mike Butera-everyone treated equally; integrity of count shows no changes; Romelda Crocamo-there is time for a challenge

Adam Christian, Swoyersville Council-Term 'courtesy count' came from Bob Morgan, he received one more 'scattered' vote, did not get a copy of the petition, did not receive a continuance, did not agree to be there; was not there for the count; feels not treated fairly; wants everyone treated fairly

Bob Morgan-did refer to a 'courtesy count' but it was part of the audit; Romilda Crocamo-saw petition, advised Mr. Butera and he took over; will provide it if (Mr. Christian) wants it Mike Butera-asked if rather than file would doing it as part of the audit satisfy them?

Sean Donahue-Mr. D says he as far as he knows he was to only one to write in his name for for some offices. (Romilda Crocamo advised the Board not to respond due to pending litigation.)



What determines scattered? Why are some votes counted and others not? Clarify the criteria. Feels he is being forced to file a lawsuit; has a constitutional right to vote for himself for Supreme Court Justice. Says if this is clarified it will prevent a lawsuit and opens up other avenues like Council for a change of procedure.

Diane Noss, Shickshinny-Some write in with the correct spelling and some don't; can a candidate go to court to claim votes? Mike Butera-Candidates can advise Bureau of write in campaigns prior to the election and list different spellings/variations of name. After, they can petition the court to cumlulate and the court decides. Diane Noss-prior elections they could go in to the Bureau after the election and advise them to cumulate various names.

Walter Griffith-the petition to recount the vote was not filed; Title 25 says how to do a recount and this process should be followed; wants clarification of the filing deadline; Title 3265 outlines how a recount is to be done; Mike Butera is selectively using the law. How should people proceed?

Diane Noss-Where can she find the list of names and number of signatures needed.

Romilda Crocamo-petition was brought to the Bureau who advised her to go to the courthouse; went to the Office of Law. Deadline to file is five days, Wednesday.

Bob Morgan-He did not receive the petition.

Walter Griffith-Law should be followed; no exceptions made.

Adam Christian-left the recount at 2:25 PM; was forced to be there.

Rick Nardone-He was there during the whole thing. Participated in the audit; needed to audit about 1120 ballots did about 1750; there was a potential petition; this didn't take away from anything, satisfied a candidate and extended the audit; practical and logical; believes it didn't violate the election law regarding recounts; maybe the Board needs a 3rd party election attorney; we did not favor one over the other in any case and needs to see validation of the claim we did

MOTION TO ADJOURN

Rick Nardone 2nd Audrey Serniak unanimous motion carries

NEXT MEETING June 14 2021 6 PM for local races

ADJOURNED 5:31 PM

### **Overview of Board of Elections & Registration**

The Luzerne County Board of Elections and Registration shall have and exercise all powers and duties stated in Section 8.04 of the Luzerne County Home Rule Charter and, shall provide general supervision over all elections conducted by the County in accordance with the Pennsylvania State Bureau of Commissions, Elections and Legislation.

In accordance with Section 8.04 of the Home Rule Charter for Luzerne County, the Board of Elections and Registration is comprised of five registered voters. Four of the members are appointed by resolution of County Council and the fifth member is appointed by an affirmative vote of those four members. At the time of their appointment, each member of the Board of Elections and Registration appointed by County Council, shall have been a member of the same political party continuously for at least five years and shall remain a member of that party during his/her term of office.

If any member of the Board of Elections and Registration files a petition for nomination or election or becomes a candidate for any elective public office, his/her position shall become vacant, and the vacancy shall be filled by County Council within 60 days after the declaration of the vacancy.

Any three members of the Board of Elections and Registration shall constitute a quorum and shall have the power to perform the functions of the Board of Elections and Registration.

The Board of Elections and Registration adopt and publish a meeting schedule, prior to every calendar year. You can find the meeting schedule above.

## **Board of Elections & Registration Directives to Bureau of Elections**

1. Written **Outline of Process for Handling Complaints or Issues at State or Local Level & Report of Follow Up to Complaints or Issues from the May 2021 Primary**. Submit both to Board of Elections & Registration by July 9, 2021
2. **Posting of May 2021 Primary Campaign Finance Reports** to county website in a “user-friendly” manner. Complete by July 16, 2021.
3. Written plan/process created and completed for May 2021 Primary **Pollworker Feedback**. All feedback received will be shared with the Board of Elections & Registration. Complete by July 30, 2021
4. Creation of plan - going forward - to post **Campaign Finance Reports** on the website after each of the pre-election and post-election mandated dates for campaign finance reporting. Submit plan to Board of Elections & Registration by August 13, 2021.
5. Plan and Implementation of an **Election Day Poll Worker/Bureau Staff Direct Communication Means**. Submit plan to Board of Elections & Registration by August 30, 2021
6. Evaluation/Review of current **poll worker training program** with focus on attendance and understanding of directions and ways to improve both. Submit findings and proposed changes for improvement by August 30, 2021
7. Written **outline of basic procedures and practices for “Election Operations of the Bureau”** (Pre-Election Day Procedures, Election Day Procedures, Adjudication Procedures, and Post-Election Day Procedures). Submit by September 30, 2021
8. Documentation of/**outline of job descriptions** for each position in the Bureau of Elections. This should be specific and itemized to the fullest extent possible. Overlap with duties and responsibilities between positions should be noted in job description. Submit by October 15, 2021

9. Research for, and **upgrade of the Bureau of Elections Website** to a more “user-friendly” platform with well-formatted content that is easy to scan. Complete by October 30, 2021

## Attachment 7

**Darin Bielby,**  
**v.**  
**Zoning Board of Adjustment of the City of Philadelphia,**  
**v.**  
**Carla Willard, Connie Winters, Michael Ramos, Susan Wright, Appellants.**

No. 1441 C.D. 2019.

**Commonwealth Court of Pennsylvania.**

Argued: March 15, 2021.

Filed: April 9, 2021.

BEFORE: HONORABLE ANNE E. COVEY, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE J. ANDREW CROMPTON, Judge.

## **OPINION NOT REPORTED**

MEMORANDUM OPINION BY ANNE E. COVEY, Judge.

Carla Willard (Willard), Connie Winters (Winters), Michael Ramos and Susan Wright (collectively, Appellants) appeal from the Philadelphia County Common Pleas Court's (trial court) August 14, 2019 order granting Darin Bielby's (Bielby) Motion to Enforce the Trial Court's October 1, 2018 Order and Impose Sanctions (Motion). The sole issue before this Court is whether the trial court properly levied monetary sanctions in the form of costs and fees on Appellants.<sup>[1]</sup>

## **Background**

On May 30, 2017, Bielby applied to the City of Philadelphia's (City) Department of Licenses and Inspections (L&I) for a zoning use registration permit to renovate 224-230 West Tulpehocken Street (Property). Bielby sought to convert a former nursing home located on the Property into a mixed-use building with 14 residential units, add a commercial space, erect a second story along Pastorius Street, and add 21 accessory parking spaces (Application). On June 20, 2017, L&I denied the Application because, *inter alia*, the proposed multi-family use was not permitted in the Property's residential, single-family, detached zoning district; the proposed accessory parking was not permitted in the required front set-back from Pastorius Street; and mandatory landscaping and buffers were not included for the accessory parking.

Bielby appealed to the City's Zoning Board of Adjustment (ZBA) on July 14, 2017. The ZBA held a hearing on October 4, 2017, and approved the variances subject to a proviso restricting parking and additional curb cuts on Pastorius Street. Thereafter, Bielby and Appellants filed various motions concerning the proviso upon which the ZBA ruled. Subsequently, the parties appealed to the trial court and, thereafter, to this Court.<sup>[2]</sup> Relevant to the current matter, on October 1, 2018, the trial court affirmed the ZBA's October 4, 2017 decision granting the variances, but reversed the proviso.

## **Facts**

From October 2018 through January 2019, Appellants and their counsel (Counsel) engaged in *ex parte* email communications with the City's Streets Department (Streets Department) and the Deputy Commissioner of Transportation (Deputy Commissioner) in an effort to have the Streets Department and L&I deny Bielby's development plans without revision or the proviso, thereby preventing Bielby from obtaining permits necessary to make the curb cuts. Bielby was not included in any of the email communications. On October 10, 2018, Willard emailed the Streets Department,<sup>[3]</sup> stating, in relevant part: "We'd of course prefer to honor the ZBA and not have curb use at all, but we know that issue is out of your hands. At the very least, we'd like to have some time before anything happens." Reproduced Record (R.R.) at 277a.<sup>[4]</sup> Willard also asked that the Streets Department notify her of any changes to Bielby's curb cut permit. See *id.* On October 16,

2018, Counsel emailed the Deputy Commissioner requesting to speak with him so that he could better understand "the status of the permits issued so far and the need for any future permits or [the] Streets Department[s] approvals for the curb cuts." R.R. at 281a. On October 18, 2018, Counsel emailed the Streets Department,<sup>[5]</sup> writing: "Hi Pat: Wondering if you have an update for me on the status of the revocation of the two curb cut approvals." R.R. at 279a. The Streets Department rescinded Bielby's curb cut approval on October 23, 2018. On December 29, 2018, Willard emailed Winters, among other recipients, declaring: "From what I understand from them, the Streets Department will ultimately be forced to abide by [the trial court's] ruling if we do not have a 'Stay' from [the] Commonwealth [Court] in place[.]" R.R. at 289a.

Bielby submitted a Right-to-Know Law<sup>[6]</sup> Request to the City's Law Department and became aware of Appellants' *ex parte* communications with the Streets Department and the Deputy Commissioner. On June 12, 2019, Bielby filed the Motion. On August 14, 2019, the trial court held a hearing, and granted Bielby's request for sanctions. The trial court directed Appellants to pay all costs and fees associated with the Motion in the amount of \$1,500.00 and a \$15,528.51 sanction for the additional costs Bielby incurred to third-party professionals as a result of Appellants' conduct.<sup>[7]</sup>

On September 8, 2019, Appellants appealed from the trial court's August 14, 2019 order to this Court.<sup>[8]</sup> On September 10, 2019, the trial court ordered Appellants to file a Statement of Errors Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure (Rule) 1925(b) (Rule 1925(b) Statement). On September 13, 2019, Appellants filed a Motion for Reconsideration, which the trial court denied on September 17, 2019. On September 25, 2019, Appellants filed their Rule 1925(b) Statement. On January 16, 2020, the trial court filed its Rule 1925(a) opinion.<sup>[9]</sup><sup>[10]</sup>

## Discussion

Appellants argue that, although the matter was on appeal at the time of the alleged conduct concerning the *ex parte* communications, Appellants were no longer parties to the action before the trial court and, therefore, the trial court did not have jurisdiction over Appellants at the time of the sanctions hearing. Further, Appellants assert that, in granting sanctions against Appellants, the trial court did not articulate the legal basis for sanctions or identify conduct by Appellants or Counsel that warranted sanctions. Bielby rejoins that the sanctions were within the trial court's discretion, because Appellants were trying to circumvent the trial court's order. The trial court opined that it had authority pursuant to Section 2503 of the Judicial Code, 42 Pa.C.S. § 2503, and Rule 1701(b)(2) to impose the sanctions on Appellants. See Trial Ct. Op. at 4.

Initially,

[w]e [] distinguish between an award of counsel fees under [Section 2503 of the Judicial Code] and a finding of contempt, [under Rule 1701(b)(2),] which may include an award of counsel fees as a sanction. See Mrozek v. James, 780 A.2d 670, 674 (Pa. Super. 2001) (stating, "[t]he award of attorney[']s fees is an appropriate remedy in a civil contempt case, *separate and apart* from the statutory provision for attorney's fees under [Section 2503(7) of the Judicial Code].") (emphasis supplied); accord Diamond v. Diamond, 792 A.2d 597, 601 (Pa. Super. 2002); see generally 42 Pa.C.S. § 2503(7) (allowing a party 'counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter[]'). Classically, in considering a motion to award counsel fees under [S]ection 2503 [of the Judicial Code], an evidentiary hearing is generally required.

With respect to civil contempt, "[i]t is axiomatic that courts have always possessed the inherent power to enforce their orders and decrees by imposing sanctions for failure to comply with said orders." Rouse Phila[.] Inc. v. Ad Hoc '78, ... 417 A.2d 1248, 1257 ([Pa. Super.] 1979) (citations omitted).

The objective of a civil contempt proceeding is remedial and judicial sanctions are employed to coerce the defendant into compliance with the court's order, and in some instances to compensate the complainant for loss sustained. In civil contempt cases, the complaining party has the burden of proving non-compliance with the court order by a preponderance of the evidence. To be punished for civil contempt, a party must have violated a court order. The order that forms the basis for the contempt process in civil proceedings must be definitely and strictly construed. Any ambiguity or omission in the order forming the basis for the civil contempt proceeding must be construed in favor of the defendant. Where the order is contradictory or the specific terms of the order have not been violated, there is no contempt.

C.R. by Dunn v. Travelers, . . . 626 A.2d 588, 592 ([Pa. Super.] 1993) (citations omitted)[.]

. . . .

The court, after finding civil contempt, may impose sanctions.

Attorney[s] fees and other disbursements necessitated by the contemnor's non[-]compliance may be recovered by the aggrieved party in a civil contempt case. Because an award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent, it is coercive and compensatory, and not punitive. Counsel fees are a proper element of a civil contempt order. In reviewing a grant of attorney's fees, we will not disturb the decision below absent a clear abuse of discretion.

Mrozek, 780 A.2d at 674 (citations omitted). . . .

Wood v. Geisenheimer-Shaulis, 827 A.2d 1204, 1207-08 (Pa. Super. 2003) (emphasis added; citations omitted). Here, the trial court imposed upon Appellants "costs and fees associated with the [] [M]otion for sanctions in the amount of \$1,500[.00,]" and "[a] monetary sanction in the amount of \$15,528.51 . . . for their deliberate efforts to circumvent and violate [the trial c]ourt's October 1, 2018 Order." Trial Ct. August 14, 2019 Order.

## Jurisdiction

At the outset, as a

[p]rerequisite to any consideration of the merits of this appeal, [this Court] must determine whether the order of [sanctions] is appealable. Although the parties have not raised appealability, 'it is nevertheless appropriate for us in this instance to raise that issue [because it] goes to the jurisdiction of th[is] Court.' Fried v. Fried, . . . 501 A.2d 211, 212 ([Pa.] 1985). Moreover, since we lack jurisdiction over an unappealable order it is incumbent on us to determine, *sua sponte* when necessary, whether the appeal is taken from an appealable order.

Kulp v. Hrivnak, 765 A.2d 796, 798 (Pa. Super. 2000).

The Pennsylvania Superior Court explained:

Subject to exceptions, 'an appeal may be taken of right from any final order of an administrative agency or lower court.' Pa.R.A.P. 341(a). A final order is an order that disposes of all claims and of all parties, or is expressly defined as a final order by statute or the ordering court. Pa.R.A.P. 341(b); *see also Ben v. Schwartz*, . . . 729 A.2d 547, 550 ([Pa.] 1999). Although the instant order does not fit any of these definitions perfectly, we must consider whether the practical ramification of the order will be to dispose of the case, making review appropriate.

. . . .

In the past, our courts have considered the appealability of orders awarding attorneys' fees and costs in a variety of procedural circumstances. *See, e.g., Brawley Distrib[.] Co., Inc. v. Heartland [Props.]*, 712 A.2d 331, 332 (Pa. Super. 1998) (grant of fees based on frivolous pre-trial filing is not appealable); Dooley v. Rubin, . . . 618 A.2d 1014, 1018 n.6 ([Pa. Super.] 1993) (denial of fees in order terminating underlying litigation is appealable); Fried, [501 A.2d] at 215 (grant of interim fees in divorce action is interlocutory and unappealable). However, this case requires us to determine for the first time whether an order to pay attorneys' fees and costs is appealable when the appellant does not also challenge the merits of the underlying order.

In *Brawley*, [] we determined that an order granting counsel fees based on a frivolous pre-trial filing was not appealable because it 'neither terminated the action nor disposed of all parties and all claims.' [*Id.*] at 332. The instant case presents a much different situation. While [the a]ppellants do not challenge the portion of the order compelling performance of the settlement agreement, they do challenge the trial court's *sua sponte* finding that their conduct was 'vexatious, obdurate or dilatory' and thus warranted awarding attorneys' fees



under [Section 2503(7) of the Judicial Code]. Unlike the appellants in *Brawley*, the instant appellants will have no subsequent chance to appeal the portion of the order directing them to pay attorneys' fees and costs. It would defy common sense and undermine judicial efficiency to require [the a] ppellants to also appeal the portion of the order compelling their compliance with the settlement agreement. Since the instant appeal presents the only chance for [the a] ppellants to challenge the attorneys' fees award, we conclude that the order is appealable. . . .

*Kulp*, 765 A.2d at 798-99 (emphasis added).

Similarly, here, because an appeal from the trial court's October 1, 2018 order had already been filed when the sanctions order was issued, the instant appeal was the only chance for Appellants to challenge the trial court's sanctions order. Accordingly, this Court concludes that the order is appealable.

## Section 2503 of the Judicial Code

Section 2503 of the Judicial Code provides, in relevant part:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

....

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

42 Pa.C.S. § 2503 (emphasis added).

This Court has explained:

Under Section 5505 of the Judicial Code, [42 Pa.C.S. § 5503,] a trial court lacks authority to award additional relief sought more than 30 days after its final order in a case. *Strohl v. S[.] Annville [Twp.]* (Pa. Cmwlth. Nos. 2162 C.D. 2009 & 2324 C.D. 2009, filed April 13, 2011), slip op. at 11-12 . . . ; *In re Estate of Bechtel*, 92 A.3d 833, 843 (Pa. Super. 2014); *Freidenbloom v. Weyant*, 814 A.2d 1253, 1255 (Pa. Super. 2003), *overruled in part on other issue by Miller Elec[.] Co. v. DeWeese*, . . . 907 A.2d 1051 ([Pa.] 2006). 'A trial court's jurisdiction generally extends for [30] days after the entry of a final order. . . . After the 30[-]day time period, the trial court is divested of jurisdiction.' *Freidenbloom*, 814 A.2d at 1255. Accordingly, where a request for counsel fees under [Section 2503 of the Judicial Code] is filed more than 30 days after final judgment, the trial court has no jurisdiction to act on that request, and its award of counsel fees must be vacated for lack of jurisdiction. *Strohl*, slip op. at 11-14. . . (vacating award of counsel fees for lack of jurisdiction where motions for sanctions were filed 38 days or more after trial court orders dismissing complaint with prejudice); *Freidenbloom*, 814 A.2d at 1255-56 (vacating award of counsel fees for lack of jurisdiction where petition for counsel fees was filed 36 days after discontinuance of action).

*Ness v. York Twp. Bd. of Comm'rs*, 123 A.3d 1166, 1169 (Pa. Cmwlth. 2015) (footnote omitted).

Here, the trial court entered its order on October 1, 2018. Bielby did not file his Motion until June 12, 2019. Moreover, the conduct complained of did not occur *during the pendency of the matter* before the trial court as required by Section 2503(7) of the Judicial Code. Rather, the conduct occurred *after* the trial court issued its October 1, 2018 order.<sup>[11]</sup> Accordingly, the trial court had no jurisdiction to sanction Appellants under Section 2503 of the Judicial Code.

## Rule 1701(b)(2)

Rule 1701(b) states, in pertinent part:

After an appeal is taken or review of a quasi[-]judicial order is sought, the trial court or other government unit may:

.....

(2) Enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.

Pa.R.A.P. 1701(b) (emphasis added).

[Rule] 1701(b)(2) states that the trial court has the power to 'enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.' [Pa.R.A.P. 1701(b)(2).] We have previously noted in discussing the effect of Rule 1701(b) that[] 'trial court[s] possess inherent power to enforce their orders and decrees by imposing sanctions for failure to comply with their orders. *Rouse Phila[.] Inc.* . . . , . . . 417 A.2d [at] 1257 . . . . This power is retained even after an appeal is filed, absent supersedeas.'<sup>[12]</sup> *Travitsky v. Travitsky*, . . . 534 A.2d 1081, 1084 ([Pa. Super.] 1987) (citing Pa.R.A.P. 1701(b)(2)).

*Tanglwood Lakes Cmty. Ass'n v. Laskowski*, 616 A.2d 37, 39 (Pa. Super. 1992).

Here, Bielby was seeking to have the trial court's order enforced, i.e., to have his building permit issued,<sup>[13]</sup> and to have Appellants sanctioned for their conduct in trying to circumvent the trial court's order. Essentially, Bielby was asking the trial court to find Appellants in civil contempt of court. The Pennsylvania Superior Court has explained:

In proceedings for civil contempt of court, the general rule is that the burden of proof rests with the complaining party to demonstrate, by [a] preponderance of the evidence, that the defendant is in noncompliance with a court order. However, a mere showing of noncompliance with a court order, or even misconduct, is never sufficient alone to prove civil contempt.

To be punished for contempt, a party must not only have violated a court order, but that order must have been 'definite, clear, and specific' — leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct.' Because the order forming the basis for civil contempt must be strictly construed, any ambiguities or omissions in the order must be construed in favor of the defendant.

In such cases, a contradictory order or an order whose specific terms have not been violated will not serve as the basis for a finding of contempt. To sustain a finding of civil contempt, the complainant must prove certain distinct elements: (1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent. A person may not be held in contempt of court for failing to obey an order that is too vague or that cannot be enforced.

When holding a person in civil contempt, the court must undertake[:] (1) a rule to show cause; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the contempt citation; and (5) an adjudication of contempt. .

*In re Contempt of Cullen*, 849 A.2d 1207, 1210-11 (Pa. Super. 2004) (footnote omitted) (quoting *Lachat v. Hinchliffe*, 769 A.2d 481, 488-89 (Pa. Super. 2001) (citations omitted) (emphasis in original)). The *Cullen* Court expounded:

'Fulfillment of all five factors is not mandated, however.' *Wood* . . . , 827 A.2d [at] 1208 . . . . '[T]he essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard.' *Schnabel Assoc[s.], Inc. v. Bldg. [&] Const[r]. Trades Council*, . . . 487 A.2d 1327, 1334 ([Pa. Super.] 1985) . . . .

*Cullen*, 849 A.2d at 1211 (emphasis added).

On October 1, 2018, the trial court entered an order expressly reversing the ZBA's proviso which stated, no parking on Pastorius Street and parking curb cut only on Tulpehocken Street. Bielby's Motion specifically sought, *inter alia*:

1. The . . . Streets Department and [L&I] shall accept [] Bielby's zoning plans approved at the [ZBA's] October 4, 2017 hearing, without revision or proviso (the "Approved Zoning Plan");
2. [L&I] shall accept the Approved Zoning Plan for purposes of issuance of any building permit applications submitted by [] Bielby;

3. [Appellants] shall pay all costs and fees associated with the herein [Motion] in the amount of \$\_\_\_\_\_;

4. A monetary sanction in the amount of \$\_\_\_\_\_

....

Bielby's Motion, Proposed Order (emphasis added).

At the commencement of the August 14, 2019 hearing, Bielby stated: "We have withdrawn the motion seeking enforcement [of the order, i.e., issuance] of the permit. However, we are still seeking sanctions due to the deliberate conduct of [Counsel] seeking to circumvent [the trial court's] October 1, 2018[] order." R.R. at 298a-299a. Bielby presented emails evidencing that Appellants were trying to have his curb cut approvals revoked or their issuance delayed as long as possible. Based upon the emails, the trial court concluded that Appellants were in fact trying to circumvent its order and therefore sanctioned Appellants in the form of fees and costs.

This Court recognizes that "each court is the exclusive judge of contempts against its process, and [this Court] will reverse an order of contempt only upon a showing of a plain abuse of discretion." Cullen, 849 A.2d at 1211 (quoting Diamond v. Diamond, 792 A.2d at 600). However, even if this Court was to conclude that Appellants acted with wrongful intent, because Bielby withdrew the portion of his Motion seeking to enforce the trial court's order, i.e., his permit was issued, the trial court had no basis upon which to find contempt and sanction Appellants.<sup>[14]</sup><sup>[15]</sup> In addition, the record evidence reveals that, while Appellants had notice of the hearing, the trial court precluded Appellants from presenting their witness and failed to implement the prerequisites before adjudicating Appellants in contempt.

Specifically, the following interaction occurred between Counsel and the trial court during the hearing:

[Counsel]: But I have five arguments I want to present on the record, and I have a witness to present.

THE COURT: I'm not listening to any witness testimony. I don't need witness testimony. It's simply —

[Counsel]: Your Honor, there's a factual issue here. We are telling you that no communication from us, from this law firm or our clients, did anything to circumvent [the trial court's] order, and this witness is the one who can tell you why the Streets Department pulled their [sic] approval back and why they [sic] then gave it again. It had nothing to do —

THE COURT: My question to you is this: Did you, in fact, contact them [sic] via email, send email communications? Yes or no?

[Counsel]: Yes[,] and not to circumvent your order.

THE COURT: I don't need a witness for that.

[Counsel]: That's not what my witness is for, Your Honor. My witness is for whether we engaged in any conduct that is illegal or unethical or —

THE COURT: That's for the [trial c]ourt to decide. That's an issue for the [trial c]ourt.

R.R. at 313a-314a.

Clearly, because the trial court held a hearing and ruled on the Motion immediately thereafter from the bench, it did not undertake "(1) a rule to show cause; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the contempt citation; and (5) an adjudication of contempt." Cullen, 849 A.2d at 1211 (quoting Lachat, 769 A.2d at 489). However, even if this Court was to treat the Motion as a petition for contempt, the essential due process requisites were not met.

This Court has elucidated:

[A]n abbreviated process for finding contempt is permitted provid[ed] that notice of the violations alleged and an opportunity for explanation and defense are given, and where the merits of the underlying matter have already been heard and decided after a full hearing and which have been served on the contemnor.

Cleary v. Dep't of Transp., 919 A.2d 368, 372 (Pa. Cmwlth. 2007). "The essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard," *In re: Contempt of Court*, 849 A.2d 1207, 1211 (Pa. Super. 2004), which [Appellants were not] afforded in this case." Cleary, 919 A.2d at 372.

This Court understands Bielby's and the trial court's frustration with Appellants' *ex parte* communications with the Streets Department and the Deputy Commissioner in what appears to have been an attempt to block the issuance of Bielby's building permit. However, because the trial court's order did not specifically direct Appellants or any other entity to issue the permit, and the permit was issued, and because Appellants were not given their requisite due process, the trial court did not have authority under Rule 1701(b)(2) to sanction Appellants.<sup>[16]</sup>

For all of the above reasons, the trial court's order is vacated.

President Judge Brobson and Judges Cohn Jubelirer and Fizzano Cannon did not participate in the decision in this matter.

## ORDER

AND NOW, this 9th day of April, 2021, the Philadelphia County Common Pleas Court's August 14, 2019 order is VACATED. Tulpehocken Mansion, LLC's unopposed Application to Substitute Appellee Property Owner from Darin Bielby to Tulpehocken Mansion, LLC is GRANTED.

[1] Appellants presented 15 issues for this Court's review: (1) whether the trial court improperly imposed sanctions against Appellants; (2) whether the trial court had the authority to impose sanctions; (3) whether the trial court identified the legal basis under which the sanctions were imposed; (4) whether the trial court failed to identify whether it was imposing sanctions against Appellants for civil contempt, in violation of Section 2503(7) of the Judicial Code, 42 Pa.C.S. § 2503(7); (5) whether the trial court improperly determined that Appellants were liable for civil contempt because there was insufficient evidence to establish: Appellants violated the October 1, 2018 order; definite, clear and specific instructions in an order by the trial court not followed by Appellants; and Appellants acted with wrongful intent; (6) whether the trial court improperly determined that Appellants violated Section 2503(7) of the Judicial Code because the evidence was insufficient to establish Appellants acted in a manner which was dilatory, obdurate and vexatious; (7) whether Section 2503 of the Judicial Code applied, as Appellants' intervention was struck by the October 1, 2018 order, and conduct following the litigation cannot form the basis for sanctions under Section 2503 of the Judicial Code; (8) whether, at the time of the August 14, 2019 hearing, the trial court had the power to sanction Appellants when they were not parties to the litigation at that time; (9) whether the trial court erred in determining that Appellants' conduct was improper, as there was nothing inappropriate about the communications Appellants and their counsel had with the City of Philadelphia Streets Department (Streets Department); (10) whether the trial court improperly awarded Bielby and his counsel attorneys' fees and costs without an evidentiary hearing concerning the reasonableness of fees and costs or whether the fees and costs were related to the complained of conduct; (11) whether the trial court improperly failed to identify the basis for its award to Bielby of fees in the amount of \$15,528.51; and costs in the amount of \$1,500.00; (12) whether the trial court violated Appellants' due process rights when it denied them the opportunity to offer witness testimony regarding the allegedly improper communications with the Streets Department; (13) whether the trial court violated Appellants' due process rights when it denied Appellants the opportunity to examine Bielby regarding the amounts demanded as sanctions; (14) whether the trial court improperly determined that sanctions in the form of attorneys' fees and costs should be imposed against Appellants when it did not find Appellants engaged in dilatory, vexatious or obdurate conduct; and (15) whether the evidence established harm to Bielby or his counsel caused by Appellants' purported conduct. See Appellants' Br. at 3-6. These issues are subsumed in this Court's rephrasing of the issue and will be discussed therein.

[2] On October 10, 2019, this Court vacated the trial court's October 1, 2018 order and remanded the case to the trial court for further proceedings. See *Bielby v. Zoning Bd. of Adjustment of City of Phila.* (Pa. Cmwlth. Nos. 1177, 1419, 1420 C.D. 2018, filed October 10, 2019).

[3] Willard copied the Deputy Commissioner on this email.

[4] Appellants did not number the pages in the reproduced record using a lower case "a" after the numerals, as required by Pennsylvania Rule of Appellate Procedure 2173. This Court will cite to the reproduced record in the proper format.

[5] Counsel copied the Deputy Commissioner on this email.

[6] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

[7] The additional fees and expenses to third-party professionals consisted of: \$6,996.51 to Moto Designshop LLC for additional architectural services; \$4,950.00 to Poulson & Associates for additional engineering services; \$1,082.00 to Ambric Survey for additional land survey services; and in excess of \$2,500.00 to Obermayer Redmann Maxwell & Hippel LLP for advice and consultation services related to the rescission of the previously approved zoning plan and preparation of the Motion. See R.R. at 337a-338a.

[8] "Our review is to determine whether the factual findings of the trial court are supported by competent evidence and whether the trial court committed an error of law or abused its discretion." Renfro v. Dep't of Transp., Bureau of Driver Licensing, 179 A.3d 644, 648 n.3 (Pa. Cmwlth. 2018).

[9] The trial court record was transmitted to this Court on June 24, 2020.

[10] On October 27, 2020, Tulpehocken Mansion, LLC, filed a Praecipe to Substitute Appellee Property Owner from Bielby to Tulpehocken Mansion, LLC. This Court will treat the Praecipe as an Application to Substitute.

[11] The trial court referenced in its opinion Appellants' alleged misconduct from November 2017 through August 2018; however, that conduct is not before this Court. The Motion specifically sought sanctions for actions committed to circumvent the trial court's October 1, 2018 order. See R.R. at 298a-299a (At the August 14, 2019 hearing, Bielby expressly requested "sanctions due to the deliberate conduct of [Counsel] seeking to circumvent [the trial court's] October 1, 2018[] order."). Accordingly, any conduct prior to October 1, 2018, is irrelevant to the matter before this Court.

[12] Appellants filed an Application for Supersedeas with the trial court which was denied, and two Applications for Stay or Supersedeas with this Court, which were also both denied.

[13] Bielby contends that, because he needed curb cut approvals (i.e., a curb cut permit) to have his building permit issued, Appellants' conduct relating to the curb cut approvals was an attempt to circumvent the trial court's order.

[14] Moreover, as Appellants did not have authority to issue either the curb cut approvals or the building permit, Appellants could not execute and/or violate the trial court's order.

[15] As discussed above, the trial court had no jurisdiction under Section 2503 of the Judicial Code to sanction Appellants.

[16] Notwithstanding, this Court is most disturbed by and does not condone Appellants' actions.

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## Attachment 8

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

California University of Pennsylvania,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1491 C.D. 2018
	:	
Gideon Bradshaw,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE P. KEVIN BROBSON, President Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY PRESIDENT JUDGE BROBSON**

**FILED: October 13, 2021**

This matter returns to the Court following our prior decision and the Supreme Court of Pennsylvania’s denial of allocatur in *California University of Pennsylvania v. Bradshaw*, 210 A.3d 1134 (Pa. Cmwlth.), *appeal denied*, 220 A.3d 532 (Pa. 2019). In that decision, this Court held that the California University of Pennsylvania (University) improperly denied Gideon Bradshaw’s (Respondent) request for certain donation records made pursuant to the Right-to-Know Law (RTKL).<sup>1</sup> *See Cal. Univ. of Pa.*, 210 A.3d at 1139-40. Currently before the Court is an “Application for Attorney’s Fees, Costs, and Statutory Damages for Bad Faith” (Application) filed by Respondent against the University stemming from that litigation. For the reasons that follow, the Application is granted.

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

On August 22, 2018, Respondent submitted a RTKL request to the University seeking “all records related to donations from Manheim Corp[oration (Manheim)] to the Foundation for University of California [(Foundation)] between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds.” (Reproduced Record (R.R.) at 001a.)<sup>2</sup> On August 27, 2018, the University denied the request on two grounds: (1) the University does not possess donation records of the Foundation, an independent nonprofit organization; and (2) had the request been properly directed to donation records maintained by the University, the request would be denied pursuant to Section 708(b)(13) of the RTKL, 65 P.S. § 67.708(b)(13), which provides:

(b) Exceptions.--Except as provided in subsections (c) and (d) [relating to financial records and aggregated data], the following are exempt from access by a requester under [the RTKL]:

....

(13) Records that would disclose the identity of an *individual* who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(Emphasis added.)

Respondent appealed the University’s denial to OOR. Before OOR, Respondent supplemented the record with a copy of a Memorandum of Understanding (MOU) between the Foundation and the University, arguing that it showed that the Foundation receives and manages donations on behalf of the University, thus making the Foundation’s records subject to RTKL requests directed

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<sup>2</sup> For convenience, the Court cites to the Reproduced Record filed by the University in connection with the merits of this appeal.



to the University. For its part, the University reiterated its position that the requested records were exempt from disclosure under Section 708(b)(13) of the RTKL, specifically claiming that Manheim, though a corporation, constituted an “individual” for purposes of that section. Notably, with respect to its position that it did not possess Foundation records as stated in its initial denial, the University submitted that “it does not matter whether the Foundation possesses the records or the University[;] access to donor records is protected from disclosure under [Section] 708(b)(13).” (R.R. at 025a-026a, University’s Position Statement, 9/26/2018, at 3-4 n.2.)

On October 15, 2018, OOR issued its final determination (Final Determination), granting Respondent’s appeal. Concluding that the University abandoned its argument that it did not possess the requested records, OOR turned its focus to the University’s contention that corporations qualify as “individuals” for purposes of Section 708(b)(13) of the RTKL. OOR rejected the University’s argument, relying primarily on its prior decision in *Roxbury News v. City of Harrisburg*, OOR Docket No. AP 2012-1748, slip op. at 6, which concluded that “only the identities of natural persons are exempt from disclosure under Section 708(b)(13) of the RTKL.” OOR thus determined that, having failed to demonstrate that the requested records were exempt from disclosure, the University was required to provide Respondent with all records that were responsive to the request.

The University then appealed to this Court, which affirmed OOR’s Final Determination. *Cal. Univ. of Pa.*, 210 A.3d at 1136. Before the Court, the University argued that OOR erred in determining that the requested records were not exempt under Section 708(b)(13) of the RTKL and in determining that the

University must disclose donation records of the Foundation. With respect to the University's first allegation of error, which presented an issue of first impression, the Court engaged in a statutory construction analysis to determine whether OOR's interpretation of the word "individual" was proper. We noted that, while the RTKL does not define "individual," Section 1991 of the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa. C.S. § 1991, provided meanings for statutory terms to be used unless the particular statutory context clearly indicated that a different meaning should be given to the term at issue. *See Cal. Univ. of Pa.*, 210 A.3d at 1138. Most relevantly, we observed that the Statutory Construction Act defined the term "individual" as "[a] natural person" and that the context surrounding Section 708(b)(13) of the RTKL did not clearly indicate that the General Assembly intended to depart from the definition provided in the Statutory Construction Act. *Cal. Univ. of Pa.*, 210 A.3d at 1138-39 (relying upon 1 Pa. C.S. § 1991). We concluded, therefore, that the requested records were not exempt from access under Section 708(b)(13) because Manheim is not an "individual" for purposes of that section. *Id.* at 1139.

The Court then addressed the University's obligation to provide access to the requested donation records of the Foundation, reasoning:

When a private foundation performs fundraising pursuant to an MOU with a university, the fundraising is a governmental function that the foundation is performing on behalf of the university. *E. Stroudsburg Univ. Found. v. Off. of Open Recs.*, 995 A.2d [496,] 505-06[ (Pa. Cmwlth. 2010) (en banc), *appeal denied*, 20 A.3d 490 (Pa. 2011)]. Pursuant to Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), records directly related to governmental functions are "public record[s] of the agency" which are accessible through the RTKL. The certified record in the instant matter reveals that the Foundation is engaged in performing a governmental function to the extent that it fundraises and manages donations on the University's behalf pursuant to the MOU, thereby rendering records directly related to those activities public

records of the University. As such, the University must disclose them pursuant to Section 506(d) of the RTKL, as it would any responsive records in its own actual possession. We conclude, therefore, that the OOR did not err in granting Respondent's appeal.

*Cal. Univ. of Pa.*, 210 A.3d at 1139-40 (footnotes omitted).<sup>3</sup>

Following this Court's decision, the University filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which denied the petition by order dated November 19, 2019. *Cal. Univ. of Pa. v. Bradshaw*, 220 A.3d 532 (Pa. 2019). On December 17, 2019, Respondent filed the Application. The University filed an answer in opposition to the Application, and, thereafter, this Court ordered briefing on the Application, which is now ripe for disposition.

In the Application, Respondent avers that, shortly after the Supreme Court denied the University's petition for allowance of appeal, Respondent submitted an inquiry to the University concerning production of the requested records. (Application ¶ 4.) On December 3, 2019, the University sent a written response and related documentation to Respondent indicating that it sought responsive records

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<sup>3</sup> While the University argued that "the Foundation may collect donations which are not connected to the fundraising activities the Foundation conducts pursuant to the MOU and that records of such unconnected donations are 'not automatically records of the University,'" the Court noted that it appeared from the certified record that the RTKL request did seek "records that *are* directly related to the governmental function the Foundation performs on the University's behalf, and the University [did] not contend otherwise." *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11 (emphasis in original) (quoting the University's Brief at 21). The Court further reasoned that, regardless:

[T]he correct inquiry in any case addressing Section 506(d)(1) of the RTKL (concerning records of third[-]party contractors) is to ask whether the particular records requested are directly connected to a governmental function performed on an agency's behalf. This precise inquiry is necessary because the RTKL exposes to public access "only those records in a contractor's possession that relate to [the governmental] function, not other records that a contractor maintains during the normal scope of business."

*Id.* (quoting *E. Stroudsburg*, 995 A.2d at 504).

from the Foundation following the Supreme Court's denial of allocatur and that the Foundation notified the University that no such records existed at the Foundation. (See Application ¶¶ 5-8 and attached Exhibit B.) In this regard, the University attached to its response an attestation of Robert J. Thorn, the Open Records Officer (ORO) for the University. The attestation provides, in relevant part:

4. I am familiar with the instant request that was denied by the University and subsequently litigated through the Pennsylvania Commonwealth and Supreme Courts.
5. In my capacity as the [ORO], pursuant to the decision of the [Pennsylvania] Supreme Court a request was made to the Foundation . . . on November 21, 2019 . . . .
6. Upon receipt of the request, Foundation Executive Director, Denise Smith [(Smith)], conducted a thorough examination of files in the possession, custody and control of the Foundation for records responsive to the request underlying this appeal.
7. . . . Smith concluded no such records exist.
8. As such, the University is unable to produce any such donation records from Manheim . . . to the Foundation . . . .

(Application, attached Exhibit B, Attestation of Robert J. Thorn dated 11/26/2019.)<sup>4</sup>

In its supporting brief, Respondent further explains that, after receiving the University's December 3, 2019 response, Respondent filed another RTKL request with the University, this time framing its request to encompass records of Manheim donations made directly to the University. (Respondent's Brief at 4.) In response,

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<sup>4</sup> The University's response to Respondent's inquiry also included the email serving as the University's "official request for Foundation donation records" sent to Smith following the Supreme Court's denial of allocatur, as well as Smith's email stating that the Foundation had no records that were responsive to the request. (Application, Exhibit B, emails dated 11/21/2019.)

the University provided records of donations made by Manheim to the University. (*Id.*)<sup>5</sup>

Before the Court, Respondent argues that the University engaged in various instances of bad faith and frivolous conduct in this matter given the above events. Specifically, Respondent first claims that the University failed to make a determination regarding whether the University and the Foundation as a third-party contractor had possession, custody, or control of the requested records prior to responding to Respondent's first RTKL request in August 2018, in accordance with the University's duties under Sections 506(d)(1) and 901 of the RTKL, 65 P.S. §§ 67.506(d)(1), 67.901.<sup>6</sup> Instead, as evidenced by the University's December 2019

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<sup>5</sup> Respondent attached to his brief an email exchange between Respondent and the University concerning Respondent's second RTKL request. (*See* Respondent's Brief, attached Exhibit A.) Notwithstanding any issues regarding whether the email exchange is properly of record, in its brief, the University "does not dispute that a new request for the donation records of Manheim . . . to the University was received." (University's Brief at 3 n.7.) The University explains that this second request expanded on the original request to include "records—including both records in the possession, custody or control of the [U]niversity and those in the possession, custody or control of the Foundation . . . —of donations from Manheim . . . to any [U]niversity program or any donation to the [U]niversity for any purpose . . . ." (*Id.*) Claiming that Respondent's "new request expressly acknowledge[d] that his first request did not seek University records," the University confirms that it provided records relating to donations by Manheim to the University in response to Respondent's second request. (*Id.*)

<sup>6</sup> Section 506(d)(1) of the RTKL most relevantly provides:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

It is also worth noting that pursuant to Section 506(d)(3) of the RTKL, 65 P.S. § 67.506(d)(3), "[a] request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency." Further, Section 901 of the RTKL provides, in pertinent part:

*Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record[] . . . and*

response to Respondent's inquiry following the Supreme Court's denial of allocatur in the underlying litigation, the University waited until after the Supreme Court's denial to determine whether any such records existed with the Foundation. Respondent argues that the University's failure to ascertain prior to responding to the initial RTKL request whether the Manheim donation records existed at the Foundation in particular warrants a finding of bad faith on behalf of the University.

Respondent also argues that the University engaged in bad faith and frivolous conduct in asserting and litigating its bases for denying the initial RTKL request. Respondent argues that the University's first asserted basis for its denial (*i.e.*, that the University did not "possess" responsive records of the Foundation as an independent entity) was a legally untenable position given applicable precedent, as discussed in our prior decision involving the parties. Respondent further contends that, in light of the belated revelation that no records existed at the Foundation that were responsive to the request, the University's actions resulted in the litigation of a moot controversy, the unnecessary expenditure of party and judicial resources, and the issuance of improper advisory opinions from OOR and this Court.

Finally, Respondent argues that the University acted in bad faith following the Supreme Court's denial of allocatur in this matter. Respondent contends that, following the Supreme Court's denial of review, the University should have produced the records of Manheim donations it had in its own possession at that time.<sup>7</sup>

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*whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.*

(Emphasis added.)

<sup>7</sup> Indeed, Respondent accuses the University of knowing all along that the University (and not the Foundation) possessed Manheim donation records that were "germane to the request." (Respondent's Brief at 17.)

Instead, Respondent submits, the University “deceptively” produced an attestation asserting that no responsive records existed at the Foundation, causing him to submit another RTKL request specifically seeking records of the University in order to obtain those responsive records. (Respondent’s Brief at 13, 18.) Respondent argues that the University’s bad faith and frivolous conduct as outlined above entitles him to an award of attorney’s fees, costs, and damages under the RTKL.

In response, the University argues that it acted reasonably and in good faith throughout this matter. In so doing, the University admits that it did not seek potentially responsive records from the Foundation when the RTKL request was initially made. (Answer ¶ 9.) According to the University, however, it had no legal obligation to do so for the two reasons it asserted in denying the request, *i.e.*, the request did not seek University records and the records would be nonetheless “facially exempt” under Section 708(b)(13) of the RTKL as records relating to an individual donor. (University’s Brief at 10, 12.)

The University further argues that it acted reasonably in asserting its first basis for denying Respondent’s initial RTKL request given that: (1) the request sought records of donations made by a corporation to the Foundation, an independent non-profit corporation that is not subject to the RTKL; (2) the University does not possess Foundation records; and (3) the request did not indicate on its face that Respondent sought donation records as they related to the MOU or the Foundation’s performance of a “governmental function.” As such, the University submits, it was reasonable to dispute whether the University was to infer that the request concerned a specific type of Foundation donation (*i.e.*, donations to the University being held by or directed to the Foundation) without any explicit mention thereof in the

request.<sup>8</sup> Regarding its second basis for denial, the University contends that its position on Section 708(b)(13) of the RTKL was based on a reasonable interpretation of the law at the time and that “[r]equiring an agency to search for a facially exempt record is illogical and wasteful of public resources.” (University’s Brief at 12.) The University adds that it did not mount a frivolous legal challenge in contesting the disclosure of the requested records reasonably believed to be protected by the RTKL.

The University also submits that, to the extent Respondent accuses it of acting improperly following the Supreme Court’s denial of allocatur by issuing a response that the Foundation did not possess any responsive records, the University simply responded to the original request as submitted, which sought records possessed by the Foundation, not the University. The University further argues that, with respect to the applicability of Section 506(d) of the RTKL, that provision “makes it possible for Foundation records to be considered University records, but it does not turn University records into Foundation records.” (University’s Brief at 11.) In light of the above, the University claims that it acted reasonably and in good faith in this matter, rendering the award of attorney’s fees, costs, and damages to Respondent improper.

Having set forth the parties’ contentions, the Court now turns to an analysis of whether an award of attorney’s fees, costs, and damages is appropriate in this matter. Regarding attorney’s fees and costs, Section 1304 of the RTKL, 65 P.S. § 67.1304, provides, in relevant part:

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<sup>8</sup> The University takes the position that, “[h]ad the initial request specified that the Foundation records it sought were related to the MOU, then the University’s obligation to search for the records would have been triggered.” (University’s Brief at 18 n.12.)



(a) Reversal of agency determination.--If a court reverses the final determination of the appeals officer<sup>9</sup> or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:

(1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or

(2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

(b) Sanctions for frivolous requests or appeals.--The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requester if the court finds that the legal challenge under this chapter was frivolous.

As to an award of damages for an agency's bad faith conduct, Section 1305(a) of the RTKL, 65 P.S. § 67.1305(a), provides that "[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith."

This Court has expounded upon the RTKL's treatment of an agency's bad faith conduct as follows:

The core purpose of the RTKL is ensuring access to agency records. The RTKL "is remedial legislation 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. Off[.] of Open [Recs.]*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (en banc), *aff'd*, . . . 75 A.3d 453 ([Pa.] 2013); *Off[.] of Dist. Att'y of Phila. v. Bagwell (Phila. DA)*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) ("the RTKL is remedial in nature[ ]").

In the RTKL context, "bad faith" does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the

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<sup>9</sup> To be clear, the above language refers to "when the receiving agency determination is reversed." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 34 (Pa. 2020).

level of bad faith. *Phila. DA* (affirming trial court's award of \$500 civil penalty for bad faith); *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder could discern bad faith); *Staub v. City of Wilkes-Barre & LAG Towing, Inc.* (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013) . . . (unreported) (affirming attorney fee award for agency failure to confer with contractor before responding to request). The RTKL reserves bad faith determinations for disposition by Chapter 13 Courts. *Bowling v. Off[.] of Open [Recs.]*, . . . 75 A.3d 453 ([Pa.] 2013).

The RTKL requires an agency to make a good faith effort to find and obtain responsive records before denying access. *Dorsey*. “[A]n agency [may not] avoid disclosing existing public records by claiming, *in the absence of a detailed search*, that it does not know where the documents are.” *Pa. State Police v. McGill*, 83 A.3d 476, 481 (Pa. Cmwlth. 2014) (emphasis added). Where an agency did not perform a search of its records under the RTKL until the matter was in litigation, the agency denied access in willful disregard of the public’s right to public records. *Parsons v. Pa. Higher Educ. Assist. Agency (PHEAA)*, 910 A.2d 177 (Pa. Cmwlth.) (en banc), *appeal denied*, . . . 917 A.2d 316 ([Pa.] 2006) (agency failure to review records before a hearing on denial showed willful violation of former Right-to-Know Law).

A requester bears the burden of proving an agency committed bad faith. *Uniontown Newspapers[, Inc. v. Pa. Dep’t of Corr.]*, 151 A.3d 1196, 1209 (Pa. Cmwlth. 2016)]. Evidence of bad faith is required. *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012). After-discovered records are a type of evidence from which a court may discern bad faith. *Dorsey*. Evidence of an agency’s failure to perform its mandatory duties, including a failure to search its records prior to a denial of access, may suffice. *Dorsey; accord PHEAA*.

*Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1170-71 (Pa. Cmwlth. 2018) (single judge op.) (footnote omitted), *aff’d*, 243 A.3d 19 (Pa. 2020).<sup>10</sup>

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<sup>10</sup> Pursuant to Section 414(b) of the Commonwealth Court Internal Operating Procedures (IOPs), 210 Pa. Code § 69.414(b), a single-judge opinion of the Commonwealth Court in a

With respect to frivolous legal challenges, our Court has observed that a “RTKL challenge is frivolous under Section 1304(b) [of the RTKL] if it is arbitrary, vexatious or the result of bad faith.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 442 (Pa. Cmwlth. 2011). Further, albeit not in the context of a RTKL matter, this Court has held that “[a]n appeal that raises an issue that is well settled and presents no legal support is frivolous.” *Venafro v. Dep’t of Transp., Bureau of Driver Licensing*, 796 A.2d 384, 388 (Pa. Cmwlth. 2002); *see also Hewitt v. Commonwealth*, 541 A.2d 1183, 1185 (Pa. Cmwlth. 1988) (finding appeal frivolous where issue raised was well settled by prior decision of this Court and appellant presented no legal support for argument that prior decision did not control), *appeal denied*, 554 A.2d 511 (Pa. 1989).

Beginning with the University’s actions in initially responding to Respondent’s original RTKL request, the Court notes:

Upon receipt of a request, an open records officer “must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency.” *Breslin v. Dickinson Twp.*, 68 A.3d 49, 54 (Pa. Cmwlth. 2013) (citing *Barkeyville Borough*, 35 A.3d at 96). Section 901 [of the RTKL] also includes the duty to perform a reasonable search for records in good faith. *Dep’t of Labor & Indus. v. Earley*, 126 A.3d 355 (Pa. Cmwlth. 2015). As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession. *Breslin*.

When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors. *Breslin; Staub*. Under Section 506(d) of the RTKL, 65 P.S. § 67.506(d), “the agency is

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non-election matter, “even if reported, shall be cited only for its persuasive value and not as a binding precedent.” Further, to the extent unreported panel decisions of this Court are relied upon herein, Section 414(a) of the Court’s IOPs, 210 Pa. Code § 69.414(a), provides that such decisions issued after January 15, 2008, may likewise be cited only for their persuasive value.

required to take reasonable steps to secure the records from the [contractor] and then make a determination if those records are exempt from disclosure.” *Staub*, slip op. at 6 . . . .

After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under Sections 901 and 903 of the RTKL[, 65 P.S. § 67.903]. *Breslin*; *PHEAA*. It is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the record.

*Uniontown Newspapers*, 185 A.3d at 1171-72.<sup>11</sup>

Based on the foregoing, the Court agrees with Respondent that the University was required to determine whether potentially responsive records existed at the Foundation as a third-party contractor prior to issuing its denial of Respondent’s original RTKL request. As noted, the University admittedly failed to make such an initial inquiry. Further, while the University argues that it had no initial obligation to make a determination in this regard given its asserted bases for denial of the request, the above pronouncements render the University’s position untenable. Indeed, this case demonstrates precisely why it is axiomatic that an agency fulfill its initial duties under the RTKL in searching for potentially responsive records as outlined above: had the University made an inquiry to the Foundation regarding the Foundation’s possession of Manheim donation records prior to issuing its denial of the original RTKL request, the University would have learned at that time that the Foundation did not possess any such records, thereby short-circuiting the ensuing

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<sup>11</sup> Indeed, our Supreme Court granted review of the *Uniontown Newspapers* litigation and, subsequent to the filing of the Application in this case, confirmed that “[a] good faith response--either to produce records or assert an exemption--cannot occur absent a good faith search, followed by collection and review of responsive records, so an agency has actual knowledge about the contents of the relevant documents.” *Uniontown Newspapers*, 243 A.3d at 28-29 (concluding that Pennsylvania Department of Corrections acted in bad faith at request stage of RTKL litigation “in significant part because the open records officer failed to act with diligence in response to [the] request” by, *inter alia*, simply “relying on the representations of others” within agency).

litigation that occurred in this case. The University's admitted abnegation of its mandatory duties under the RTKL in failing to conduct a proper search for responsive records prior to issuing its denial to the RTKL request warrants a finding of bad faith on behalf of the University under Sections 1304(a)(1) and 1305(a) of the RTKL.

Turning to the University's grounds for denial, the Court observes that, in asserting its first basis for denying the request—that it did not possess Foundation records—the University took a position that was contrary to settled law. As explained in our prior decision involving the present parties, in *East Stroudsburg*, this Court made clear that a private foundation that conducts fundraising on behalf of a state university pursuant to an MOU performs a “governmental function,” thereby rendering records directly related to that governmental function “public record[s] of the agency” accessible through Section 506(d)(1) of the RTKL. *Cal. Univ. of Pa.*, 210 A.3d at 1139; *see also E. Stroudsburg*, 995 A.2d at 505 (explaining that, pursuant to Section 506(d)(1), OOR properly ordered disclosure of fundraising records of university foundation because foundation, “under the MOU [in that case], carrie[d] out fundraising on behalf of the [u]niversity, making any records ‘directly’ related to performing fundraising activities on behalf of the [u]niversity”). Thus, notwithstanding that the University does not actually possess responsive records existing at the Foundation, pursuant to Section 506(d)(1) and *East Stroudsburg*, any such records would be considered “public records” of the University by virtue of the MOU existing between the University and Foundation. As such, the University's first grounds for denial was “not based on a reasonable interpretation of law” and its

subsequent pursuit of its legal challenge on appeal in this respect was frivolous.<sup>12</sup> Section 1304(a)(2) and (b) of the RTKL, 65 P.S. § 67.1304(a)(2)-(b). Although ultimately unsuccessful on its second ground for denial—*i.e.*, that Manheim was an “individual” for purposes of Section 708(b)(13) of the RTKL—that ground for denial at least provided an issue of first impression, making pursuit of the appeal on that ground more reasonable than on the first ground. Nevertheless, the University’s unreasonable interpretation of the law on the first ground for denial, particularly when considered in conjunction with the University’s failure to comply with Section 901 of the RTKL and the ramifications of such failure, provide further evidence of bad faith on the part of the University.

Next, the Court addresses Respondent’s final claim of bad faith based on the University’s failure to disclose records of Manheim donations made to the University that it possessed until those records were specifically requested in Respondent’s second RTKL request. While Respondent essentially argues that the University nefariously viewed his original request with too narrow a lens and should have provided him with those records in response to his original request following the Supreme Court’s denial of allocatur in this matter at the latest, the original RTKL

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<sup>12</sup> The University argues that it acted reasonably concerning its first basis for denial because, as alleged previously before this Court, the initial request did not specifically indicate that it was seeking Foundation records as it related to the MOU or the Foundation’s performance of a “governmental function.” The Court disagrees. Again, the initial request sought “all records related to donations from Manheim . . . to the Foundation . . . between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds.” As noted in this Court’s prior decision, the certified record indicated that the RTKL request sought “records that *are* directly related to the governmental function the Foundation performs on the University’s behalf, and the University [did] not contend otherwise.” *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11. Additionally, the relevant inquiry under Section 506(d)(1) of the RTKL is “whether the particular records requested are directly connected to a governmental function performed on an agency’s behalf.” *Id.* The University’s position, therefore, is meritless.

request sought records related to donations made by Manheim to the Foundation; it did not specify that it sought records related to donations made by Manheim directly to the University. While the University's provision of such documents prior to their specific request would have perhaps been in the spirit of the RTKL's purpose of open access, the Court concludes that the University's interpretation of the original request does not in and of itself rise to the level of a bad faith interpretation. Stated another way, Respondent has failed to demonstrate bad faith conduct on behalf of the University in construing the original request under the circumstances and evidence presented.<sup>13</sup>

In sum, the Court concludes that the University engaged in bad faith and frivolous conduct in denying Respondent's RTKL request without first determining whether the Foundation had potentially responsive records in its possession, in asserting its first basis for denying the request, and in litigating both bases for its denial on appeal. The Court further concludes, however, that the University did not engage in bad faith conduct in failing to produce records of Manheim donations given directly to the University until those records were specifically requested.

With regard to the amount of attorney's fees, costs, and damages to be awarded, Respondent seeks a total of \$15,298.32 in attorney's fees and costs under Section 1304 of the RTKL; however, he has presented the Court with documentation supporting an award of only \$14,298.32.<sup>14</sup> Respondent also seeks the

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<sup>13</sup> Notwithstanding, it is worth noting that, had the University properly fulfilled its obligations under the RTKL in initially responding to the original RTKL request regarding Manheim donations made to the Foundation, Respondent would have been able to submit his subsequent request in an effort to obtain responsive records of Manheim donations made to the University much sooner.

<sup>14</sup> It appears that the discrepancy between the amount Respondent claims is owed and the amount supported by the documentation is the result of a mathematical error. Respondent attached

maximum \$1,500 allowed in statutory damages under Section 1305 of the RTKL. While the University disputes the grounds upon which the request for attorney's fees, costs, and statutory damages is based, the University does not appear to take any position with regard to the requested amounts as unreasonable or excessive. In the absence of such a challenge and in view of the University's bad faith and frivolous conduct as outlined above and the documentation supporting Respondent's requested amounts, the Court finds the supported amounts to constitute an appropriate award. Respondent's Application, therefore, is granted, and Respondent is awarded \$14,298.32 in attorney's fees and costs under Section 1304 of the RTKL and \$1,500 in statutory damages under Section 1305 of the RTKL.



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P. KEVIN BROBSON, President Judge

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to the Application as Exhibit C a copy of the legal bills incurred for the work counsel provided in litigating the above-captioned matter and particularly the cost of preparing the Application, which Respondent claims amounts to a total of \$8,278.32, as well as an attestation of their authenticity. The invoices are dated March 4, 2019; May 7, 2019; June 4, 2019; August 5, 2019; and December 3, 2019; respectively, they reflect amounts of \$3,861.00, \$838.50, \$1,915.82, \$468.00, and \$195.00, for a total of \$7,278.32. Further, Respondent attached to his brief in support of the Application an affidavit of counsel as to the hours spent in preparing the brief and an accompanying invoice totaling \$7,020.00. In the attestation attached to Respondent's brief, counsel states that his rate is \$195 per hour and that the services provided are reasonable, as he has "represented the newspaper for 30 years and ha[s] developed professional skill in First Amendment and publishing law." (Respondent's Brief, Exhibit B, Affidavit of Colin E. Fitch dated 1/3/2020.) The affidavit further provides:

The issues involved in this litigation are important and involve the production of public records despite a government agency's denial of access to same. The issues involved are complicated given the nature of the case, *i.e.*, there was production of the records requested only one week ago. The results I have obtained have been successful and any award of attorney's fees will serve the statutory scheme and promote the RTKL statutory purpose.

*Id.*



**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

California University of Pennsylvania,	:		
	:		
Petitioner	:		
	:		
v.	:	No. 1491 C.D. 2018	
	:		
Gideon Bradshaw,	:		
	:		
Respondent	:		

**ORDER**

AND NOW, this 13<sup>th</sup> day of October, 2021, upon consideration of the “Application for Attorney’s Fees, Costs, and Statutory Damages for Bad Faith” (Application) filed by Respondent Gideon Bradshaw and the answer of Petitioner California University of Pennsylvania (University) filed in response thereto, and upon briefing of the matter, the Application is GRANTED. Accordingly, the University is ordered to pay \$14,298.32 in reasonable attorney’s fees and costs to Respondent pursuant to Section 1304(a) and (b) of the Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, 65 P.S. § 67.1304(a)-(b). Further, the maximum civil penalty in the amount of \$1,500 is imposed against the University and in favor of Respondent under Section 1305 of the RTKL, 65 P.S. § 67.1305. Counsel shall file a verified statement of the payment within thirty (30) days.

  
\_\_\_\_\_  
P. KEVIN BROBSON, President Judge

**IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY**

SEAN DONAHUE,	:	
Requester	:	Luzerne County
	:	No. 2021-10346
v.	:	
	:	
	:	
LUZERNE COUNTY,	:	PA OOR: AP 2021-1361
Respondent	:	

**Certificate of Service**

I verify that the below number of copies were served to the below parties on the below date via the method indicated below.

**Prothonotary of The Court of Common Pleas of Luzerne County**  
Filed Electronically

**Luzerne County Solicitor**  
USPS First Class Mail  
Luzerne County Solicitor  
200 N River Street  
Wilkes-Barre, PA 18711

**Honorable Judge Richard M. Hughes, III**  
USPS First Class Mail  
Penn Place, Suite 307  
20 North Pennsylvania Avenue  
Wilkes-Barre, PA 18702

Respectfully Submitted,

January 31, 2022  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
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**Certificate of Service**