

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

COUNTY OF BUCKS,	:	Civil Action – Appeal from State
Agency	:	
55 East Court Street	:	
Doylestown, PA 18901,	:	
	:	
Petitioner,	:	
	:	
v.	:	Docket No. 2022-00717
	:	
KATHLEEN GALLAGHER AND THE	:	
REPUBLIC NATIONAL	:	
COMMITTEE	:	
	:	
	:	
	:	
Respondent.	:	

NOTICE

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND AGAINST THE CLAIMS SET FORTH IN THE FOLLOWING PAGES, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS AFTER THIS COMPLAINT AND NOTICE ARE SERVED, BY ENTERING A WRITTEN APPEARANCE PERSONALLY OR BY ATTORNEY AND FILING IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTION TO THE CLAIMS SET FORTH AGAINST YOU. YOU ARE WARNED THAT IF YOU FAIL TO DO SO THE CASE MAY PROCEED WITHOUT YOU AND A JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT WITHOUT FURTHER NOTICE FOR ANY MONEY CLAIMED IN THE COMPLAINT OR FOR ANY OTHER CLAIM OR RELIEF REQUESTED BY THE PLAINTIFF. YOU MAY LOSE MONEY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

**BUCKS COUNTY BAR ASSOCIATION
135 EAST STATE STREET
DOYLESTOWN, PA. 18901
(215) 348-9413 OR (800)-273-2929**

BUCKS COUNTY LAW DEPARTMENT
Daniel D. Grieser, Assistant County Solicitor
Attorney I.D. No. 325445
55 East Court Street, Fifth Floor
Doylestown, PA 18901
(215) 348-6464

Attorneys for Petitioner

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

COUNTY OF BUCKS,	:	Civil Action – Appeal from State Agency
55 East Court Street	:	
Doylestown, PA 18901,	:	
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Kathleen Gallagher and the	:	
Republican National Committee	:	
	:	
	:	
Respondent.	:	

**AMENDED PETITION FOR REVIEW OF THE
JANUARY 14, 2022 FINAL DETERMINATION OF
THE PENNSYLVANIA OFFICE OF OPEN RECORDS**

Petitioner, the County of Bucks, through its undersigned counsel, hereby submits this Amended Petition for Review of the January 14, 2022 Final Determination of the Pennsylvania Office of Open Records concerning the October 27, 2021 request of Respondent, Republican National Committee, for the production of records pursuant to the Right-to-Know Law, 65 P.S. 67.101 *et seq.* In support of its Petition, the County of Bucks avers as follows:

JURISDICTION

1. This Honorable Court has jurisdiction over this Petition for Review pursuant to Section 1302(a) of the Right-to-Know Law (“RTKL”). 65 P.S. § 67.1301(a).

PARTIES

2. Petitioner is the County of Bucks (“County”), a local agency as defined by Section 102 of the RTKL. See 65 P.S. § 67.102.

3. Respondent is Kathleen Gallagher (“Requester”), who submitted the at-issue Right-to-Know (“RTK”) request to the County in this matter. Respondent, Republican National Committee, joined Ms. Gallagher in the appeal to the OOR.

PROCEDURAL HISTORY AND RELEVANT BACKGROUND

4. On October 27, 2021, the County received a RTK request from Requester. Therein, Requester sought records from the Bucks County Board of Elections regarding the following, *verbatim*:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.

4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.

7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.

8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections, including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

The October 27, 2021 RTK request is attached as Exhibit A.

5. On November 4, 2021, this Office denied Ms. Gallagher's request, *inter alia*, pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." The November 4, 2021 response is attached as Exhibit B.

6. On November 19, 2021, Requester appealed the County's denial of her RTK request to the Pennsylvania Office of Open Records ("OOR"). Requester's appeal submission and the corresponding appeal documents submitted to the parties are attached as Exhibit C.

7. On December 3, 2021, the County submitted its response to Requester's appeal submission. Therein, the County reiterated its basis for the denial of the request. The County's response to Requester's appeal submission is attached as Exhibit D.

8. On January 14, 2022, Appeals Officer Blake Eilers, Esquire, of the OOR issued a Final Determination, granting in part and denying in part Requester's appeal and directing the County to provide items 1, 2, 3 and 8. Therein, Appeals Officer Eilers determined that the County failed to establish that the request was insufficiently specific.¹ The January 14, 2022 Final Determination is attached as Exhibit E.

¹ The OOR determined that Sections 4, 5, 6, 7, and 9 of the Request were moot because responsive information could be found in an online election manual. The County had also asserted that these requests (1) were insufficiently specific and (2) were not governed by the RTKL but, instead, governed by the Pennsylvania Election Code. 65 P.S.

9. A Petition for Review was filed on February 14, 2022 that was missing exhibits.

THE COUNTY'S APPEAL TO THIS HONORABLE COURT

Standard and Scope of Review

10. In adjudicating the instant matter, this Honorable Court functions as fact finder and exercises a standard of review akin to *de novo* review. See Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Commw. Ct. 2010). This Honorable Court “may substitute its own findings of fact for that of the [OOR].” Id.

11. A *de novo* review allows for full consideration of a case another time, and this Honorable Court is “substituted for . . . the prior decision maker, and redecide[s] the case.” Forest Area Sch. Dist. v. Sloup, 621 A.2d 1121, 1125 (Pa. Commw. Ct. 1993) (citation omitted).

12. This Honorable Court, when reviewing an appeal from the OOR, is “entitled to the broadest scope of review.” Bowling, 990 A.2d at 820. The RTKL does not prohibit the Court’s supplementation of the record. Id.

13. An agency is required to “raise all its challenges before the close of evidence before the court.” Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281, 1288 (Pa. Commw. Ct. 2014) (citation omitted).

14. “The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole.” 65 P.S. § 67.1302(a). “The decision shall clearly and concisely explain the rationale for the decision.” Id.

The January 14, 2022 Final Determination should be reversed because the Request for items 1, 2, 3 and 8 was insufficiently specific under Section 703 of the RTKL

§ 67.3101 and 25 P.S. §§ 2622 and 2648. The County preserves these bases for denial in this Petition for Judicial Review.

15. Here, the County respectfully requests this Honorable Court to hold a hearing on this matter and reverse the January 14, 2022 Final Determination directing the County to produce records responsive to Items 1, 2, 3 and 8 to Requester. For the following reasons, the Request was insufficiently specific:

- a. it seeks any and all communications and fails to set any real limitations by identifying a specific transaction or activity,
- b. the request fails to limit the scope of the search as it fails to limit the number of people's communications searched and fails to name specific people's communications to be searched,
- c. and it fails to identify a finite period of time from which the records are sought.

16. Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 Pa. Stat. Ann. §67.703.

17. This office is unable to limit the scope of the search because the request seeks any and all communications and this creates too large of a universe of records to search.

18. Additionally, Ms. Gallagher's request fails to identify a specific transaction or activity in order to conduct a search for records because the phrase "relating to processing, curing, or rejection of mail-in or absentee ballots" is overly broad.

19. The request fails to limit the scope of the search as it fails to limit the number of people's communications and fails to name specific people's communications to be searched by failing to name any recipients or senders.

20. The Bucks County Board of Election currently has 15 employees which include one Director, one Assistant Director, one VR Office Supervisor, one Election Coordinator, one

Assistant Election Coordinator, one Executive Assistant, two Election Specialists, and seven Registrars.

21. During the November 2020 election approximately 35 additional employees were hired.

22. Additionally, the request seeks communication from Pennsylvania Department of State which, according to requester, includes any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State.

23. Without knowing specific employees from the Pennsylvania Department of State, it is almost impossible to conduct a search for any communications from the Department of State.

24. For example, if we attempted a search for email communications, without specific people named from the Pennsylvania Department of State, this office could not conduct a search that is limited to only senders from the Department of State.

25. With few exceptions, any office, department, or agency within the government of the Commonwealth of Pennsylvania utilizes the “pa.gov” domain and there is no way to differentiate between an email sent from the “pa.gov” domain that originated within the Pennsylvania Department of State or the other approximately 86 offices, departments, and agencies that utilize the “pa.gov” domain.

26. While the OOR Determination limited the date range to the 2020 Election, this limitation does not define a specific length of time. Communications about the 2020 Election could reach back several years or continue to the current date. The lack of a definite time range renders the request insufficiently specific.

27. Ms. Gallagher’s requests are insufficiently specific as it seeks a large universe of records (i.e. “any and all communications), it lacks any limitations on senders and recipients, and

fails to identify a finite period of time for which the records are sought, therefore, this Office is unable to conduct a reasonable search for responsive records. The County respectfully submits that, in a *de novo* hearing before this Honorable Court, it shall meet its burden of establishing that the Request was insufficiently specific pursuant to the RTKL.

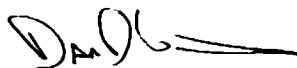
RELIEF SOUGHT

WHEREFORE, the County respectfully requests this Honorable Court to hold a hearing on this matter and, thereafter, enter an Order:

- A. Reversing the January 14, 2022 Final Determination; and
- B. Declaring that the County is not required to take any further action on Requester's October 27, 2021 request for records.

Respectfully submitted:

JOSEPH J. KHAN
County Solicitor



Date: 2-15-2021

Daniel D. Grieser, Esquire
Assistant County Solicitor

EXHIBIT A



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Bucks County Board of Elections (Attn: AORO)

Date of Request: October 27, 2021 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Kathleen A. Gallagher, as counsel for RNC Company (if applicable): Gallagher Giancola LLC

Mailing Address: 3100 Koppers Building, 436 Seventh Avenue

City: Pittsburgh State: PA Zip: 15219 Email: kag@glawfirm.com

Telephone: (412) 717-1900 Fax: (412) 717-1901

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

Please see "Attachment A" for Records Requested.

Please see "Attachment B" for Definitions and Instructions.

DO YOU WANT COPIES? ☐ Yes, printed copies (default if none are checked)
☒ Yes, electronic copies preferred if available
☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☐ No
RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.
Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: 3416 Date Received: 10-27-21 Response Due (5 bus. days): 11-3-21

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: *In most cases, a completed RTKL request form is a public record.*
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Feb. 3, 2020

ATTACHMENT A

RECORDS REQUESTED (CONTINUED)

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all **documents relied upon and/or** referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

ATTACHMENT B

DEFINITIONS AND INSTRUCTIONS:

1. The term “Document” shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.
2. The term “absentee ballot” shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.
3. The term “mail-in ballot” shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.
4. The terms “cure” or “curing” shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.
5. The term “Pennsylvania Department of State, Bureau of Elections” shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.

6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of “privilege,” please identify the legal basis for the same and the identification of any documents so withheld.

EXHIBIT B

From: Cain, Robbie L.
To: kag@glawfirm.com
Subject: Right-to-know response # 3416
Date: Thursday, November 4, 2021 6:00:00 PM

Dear Requester Gallagher,

On October 27, 2021, the Bucks County Office of Open Records received the following Right-to-Know law request:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

In addition to your request, we received the following instructions:

1. The term "Document" shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans, spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.
2. The term "absentee ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.
3. The term "mail-in ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.

4. The terms "cure" or "curing" shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.
5. The term "Pennsylvania Department of State, Bureau of Elections" shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.
6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of "privilege," please identify the legal basis for the same and the identification of any documents so withheld.

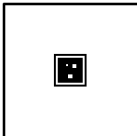
Your request is denied pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested."

You have the right to appeal the denial of information in writing to the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234. If you choose to do so, it must be done within 15 business days of the mailing date of this response. Your appeal must include a copy of this email and your request.

If you have questions, please contact me at the information below. Otherwise, please be advised that this correspondence will serve to close this file with our office as permitted by law.

Best regards,
Robbie

Robbie Cain, Esq.
Assistant County Solicitor
Law Department – County of Bucks
55 E. Court St., 5th Floor
Doylestown, PA 18901
215-348-6055
rlcain@buckscounty.org



"Openness builds trust in government. Transparency gives the public the ability to review government actions, to understand what government does, to see when government performs well, and when government should be held accountable." - Senator Pileggi

EXHIBIT C

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **January 19, 2022**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **December 3, 2021**.

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

Due to delays in U.S. mail, we urge agencies and requesters to use email for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



pennsylvania
OFFICE OF OPEN RECORDS

November 19, 2021

Via Email Only:

Ms. Kathleen Gallagher
Gallagher Giancola, LLC
3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
kag@glawfirm.com

Via Email Only:

Rachel E. Thompson, Esquire
Agency Open Records Officer
Bucks County
County of Bucks
55 E Court Street, 5th fl
Doylestown, PA 18901
openrecordsofficer@buckscounty.org
rlcain@buckscounty.org

**RE: OFFICIAL NOTICE OF APPEAL - Gallagher and Gallagher Giancola, LLC v. Bucks County
OOR Dkt. AP 2021-2528**

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 November 19, 2021. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. 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.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Blake Eilers, Esq.

CONTACT INFORMATION:

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

FACSIMILE:

(717) 425-5343

EMAIL:

beilers@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.**



pennsylvania

OFFICE OF OPEN RECORDS

IN THE MATTER OF

KATHLEEN GALLAGHER,
Requester

v.

BUCKS COUNTY,
Respondent

:
:
:
:
:
:
:
:
:
:
:

Docket No.: AP 2021-2528

This correspondence confirms the above-referenced Requester's agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before January 19, 2022.

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.

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Friday, November 19, 2021 11:10 AM
To: kag@glawfirm.com
Subject: [External] PA Office of Open Records - Appeal Confirmation

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.



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Kathleen Gallagher
Company:	Gallagher Giancola, LLC
Address 1:	3100 Koppers Building
Address 2:	436 Seventh Avenue
City:	Pittsburgh
State:	Pennsylvania
Zip:	15219
Phone:	412-717-1900
Email:	kag@glawfirm.com
Agency (typed):	Bucks County Board of Elections
Agency Address 1:	55 E. Court Street
Agency Address 2:	5th Floor
Agency City:	Doylestown
Agency State:	Pennsylvania
Agency Zip:	18901
Agency Phone:	215-348-6055
Agency Email:	rlcain@buckscounty.org
Records at Issue in this Appeal:	See attached Appeal.

Request Submitted to Agency Via:	e-mail
Request Date:	10/27/2021
Response Date:	11/04/2021
Deemed Denied:	No
Agency Open Records Officer:	Robbie Cain, Esq.
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR additional time to issue a final determination:	30 Days
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none">• Right-to-Know Request to Bucks County.pdf• Bucks County response to RTK Request.pdf• RNC- Right to Know Law Request 3416 Appeal (Bucks County).pdf

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

Appeal of Right-to-Know Law Request: Bucks County

On October 27, 2021, Kathleen A. Gallagher, on behalf of the Republican National Committee (RNC), submitted the attached request for information to the Bucks County Board of Elections (Request No. 3416) (the "Request"). The Request sought:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

The Request further set forth the following definitions and instructions:

1. The term "Document" shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.

2. The term "absentee ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.

3. The term "mail-in ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.

4. The terms "cure" or "curing" shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.

5. The term "Pennsylvania Department of State, Bureau of Elections" shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.

6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of "privilege," please identify the legal basis for the same and the identification of any documents so withheld.

Bucks County issued its response on November 4, 2021 wherein it denied Request No. 3416.

The Department's response stated, "Your request is denied pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." Otherwise, Bucks County offered no grounds for refusing the Request.

The Request specifically sought any and all communications and documents between the Bucks County Board of Elections and any third party, including the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election. The Request further sought information and documents regarding any training for poll workers and judges of elections for the 2020 General Election, as well as any documents regarding procedures to be used to count, process, cure or reject mail-in or absentee ballots for the 2020 General Election. The Department did not offer any grounds for refusal to produce documents beyond its statement that the Request did not identify the documents with sufficient specificity to enable the agency to ascertain what document had been requested. The Request, however, was specific, adequately defined and narrowly tailored to only seek documents and communications addressing discussions, training and policies regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General

Election. Such data is properly subject to disclosure under the Right to Know Law, and it is unclear how the Request could be made with greater specificity. Accordingly, the RNC requests that the Office of Open Records order that all such data be produced by Bucks County within thirty (30) business days.



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Bucks County Board of Elections (Attn: AORO)

Date of Request: October 27, 2021 Submitted via: ☐ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Kathleen A. Gallagher, as counsel for RNC Company (if applicable): Gallagher Giancola LLC

Mailing Address: 3100 Koppers Building, 436 Seventh Avenue

City: Pittsburgh State: PA Zip: 15219 Email: kag@glawfirm.com

Telephone: (412) 717-1900 Fax: (412) 717-1901

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

Please see "Attachment A" for Records Requested.

Please see "Attachment B" for Definitions and Instructions.

DO YOU WANT COPIES? ☐ Yes, printed copies (default if none are checked)

☐ Yes, electronic copies preferred if available

☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☐ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: *In most cases, a completed RTKL request form is a public record.*

More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Feb. 3, 2020

ATTACHMENT A

RECORDS REQUESTED (CONTINUED)

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

ATTACHMENT B

DEFINITIONS AND INSTRUCTIONS:

1. The term “Document” shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.
2. The term “absentee ballot” shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.
3. The term “mail-in ballot” shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.
4. The terms “cure” or “curing” shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.
5. The term “Pennsylvania Department of State, Bureau of Elections” shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.

6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of “privilege,” please identify the legal basis for the same and the identification of any documents so withheld.

Jennifer Pepmeyer

Subject: FW: Right-to-know response # 3416

From: Cain, Robbie L. <rlcain@buckscounty.org>

Sent: Thursday, November 4, 2021 6:00:49 PM

To: Kathleen Gallagher <kag@glawfirm.com>

Subject: Right-to-know response # 3416

Dear Requester Gallagher,

On October 27, 2021, the Bucks County Office of Open Records received the following Right-to-Know law request:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

In addition to your request, we received the following instructions:

1. The term "Document" shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.
2. The term "absentee ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.
3. The term "mail-in ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.
4. The terms "cure" or "curing" shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.

5. The term "Pennsylvania Department of State, Bureau of Elections" shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.
6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of "privilege," please identify the legal basis for the same and the identification of any documents so withheld.

Your request is denied pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested."

You have the right to appeal the denial of information in writing to the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234. If you choose to do so, it must be done within 15 business days of the mailing date of this response. Your appeal must include a copy of this email and your request.

If you have questions, please contact me at the information below. Otherwise, please be advised that this correspondence will serve to close this file with our office as permitted by law.

Best regards,
Robbie

Robbie Cain, Esq.
Assistant County Solicitor
Law Department – County of Bucks
55 E. Court St., 5th Floor
Doylestown, PA 18901
215-348-6055
rlcain@buckscounty.org



"Openness builds trust in government. Transparency gives the public the ability to review government actions, to understand what government does, to see when government performs well, and when government should be held accountable." - Senator Pileggi

Please Be Advised

The information in this email is confidential and may be legally privileged and protected under State and/or Federal Laws. It is

intended solely for the addressee. Access to this email by anyone else is unauthorized. If you are not the intended recipient, any

disclosure, copying, distribution or any action taken or omitted to be taken in reliance on it, is prohibited and may be unlawful.

If you believe that you have received this email in error, please contact the sender or call 215-348-6000. The opinions expressed herein may not necessarily represent those of the County of Bucks

EXHIBIT D



County of Bucks

BUCKS COUNTY OFFICE OF OPEN RECORDS

55 EAST COURT STREET

DOYLESTOWN, PA 18901

openrecordsofficer@buckscounty.org

www.buckscounty.gov

November 3, 2021

Blake Eilers, Esq.
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: 2021-2528

Dear Appeals Officer Eilers:

Please accept this submission in connection with the above appeal filed with the Office of Open Records ("OOR") by Kathleen Gallagher against the Bucks County Office of Open Records ("Bucks").

Ms. Gallagher request sought the following:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mailin or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks

County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

On October 27, 2021, the Bucks County Office of Open Records received the above mentioned Right-to-Know request. In addition to Ms. Gallagher's request, we received the following instructions:

1. The term "Document" shall mean all communications, letters, emails, electronic files, ESI (defined below), correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage media (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.

2. The term "absentee ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.

3. The term "mail-in ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.

4. The terms "cure" or "curing" shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.

5. The term "Pennsylvania Department of State, Bureau of Elections" shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.

6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of "privilege," please identify the legal basis for the same and the identification of any documents so withheld.

On November 4, 2021, this Office denied Ms. Gallagher's request pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested."

On November 19, 2021, Ms. Gallagher filed the current appeal.

Denial

I. The request is insufficiently specific.

The requested records are insufficiently specific and this Office is unable to limit the scope of the search for records because: (1) it seeks any and all communications and fails to set any real limitations by identifying a specific transaction or activity; (2) the request fails to limit the scope of the search as it fails to limit the number of people's communications searched and fails to name specific people's communications to be searched; and (3) and it fails to identify a finite period of time from which the records are sought.

Section 703 of the Right-to-Know Law states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. In determining whether a particular request is sufficiently specific, the Pennsylvania Office of Open Records (OOR) uses a three-part balancing test:

- (1) the subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought;
- (2) the scope of the request must identify a discrete group of documents (e.g., type or recipient);
- (3) it should identify a finite period of time for which the records are sought.

Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121 (Pa. Commw. Ct. 2015).

Here, the request is insufficiently specific because it has a broad scope (“any and all communications”), between an undeterminable amount of people, and does not identify a finite time period. Pa. Dep’t of Educ., 119 A.3d at 1125; see also Keystone Nursing & Rehab of Reading, LLC, v. 5 Simmons-Ritchie, 222 A.3d 1226 (Pa. Commw. Unpub. 2020) (noting that a request for “all correspondence” to a specific employee contained no subject matter). The Bucks County Board of Election currently has 15 employees which include one Director, one Assistant Director, one VR Office Supervisor, one Election Coordinator, one Assistant Election Coordinator, one Executive Assistant, two Election Specialists, and seven Registrars. During the November 2020 election approximately 35 additional employees were hired. Further, the request seeks communication from Pennsylvania Department of State which, according to requester, includes any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State. Even if the request were limited to a certain type of communication like email communications, without specific people named from the Pennsylvania Department of State, this office could not conduct a search that is limited to only senders from the Department of State. With

few exceptions, any office, department, or agency within the government of the Commonwealth of Pennsylvania utilizes the “pa.gov” domain and there is no way to differentiate between an email sent from the “pa.gov” domain that originated within the Pennsylvania Department of State or the other approximately 86 offices, departments, and agencies that utilize the “pa.gov” domain.

Ms. Gallagher’s request is specific because it seeks a large universe of records, it lacks any limitations on senders and recipients, and fails to identify a finite period of time for which the records are sought, therefore, this Office is unable to conduct a reasonable search for responsive records.

II. The Right-to-Know law is inappropriate for the requested records in paragraphs 4, 5, 6, 7, and 9.

Section 3101.1 of the RTKL provides that, “[i]f the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1. Section 2622 of the Pennsylvania Election Code states the following:

The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided, and may be inspected and copied by any *qualified elector of the county* during ordinary business hours, at any time when they are not necessarily being used by the board, or its employees having duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act.

25 P.S. § 2648. Ms. Gallagher requests in paragraphs 4, 5, 6, 7, and 9 are not governed by the Right-to-Know Law. As the Pennsylvania Election Code establishes the procedure to access election records and what types of records are subject to inspection, any request for access to these types of records must be made pursuant to the provisions of the Election Code and not under the Right-to-Know Law. To the extent that the records sought in paragraphs 4, 5, 6, 7, and 9 are available on a publicly accessible website, the request is inappropriate as a Right-to-Know request.

For the reasons above, this Office respectfully requests that the OOR deny the current appeal and find Ms. Gallagher’s request is insufficiently specific and Ms. Gallagher’s request is not appropriate as a Right-to-know request because it is governed by the Pennsylvania Election Code, which establishes the procedure to access election records, and the records sought are available on a publicly accessible website.

If you have any questions, feel free to contact me at 215-348-6055 or via email at rlcain@buckscounty.org.

Respectfully,

/s/Robbie L. Cain

Robbie L. Cain

Open Records Officer



County of Bucks

BUCKS COUNTY OFFICE OF OPEN RECORDS

55 EAST COURT STREET

DOYLESTOWN, PA 18901

openrecordsofficer@buckscounty.org

www.buckscounty.gov

Name of Requester:

Kathleen Gallagher

Records Requested:

- 1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.**
- 2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.**
- 3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.**
- 4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.**
- 5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.**
- 6. Any and all documents reflecting the procedure used to count, process, cure, or reject mailin or absentee ballots for the 2020 General Election.**
- 7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.**
- 8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.**

9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

Appeal Caption: 2021-2528, Gallagher v. Bucks

**AFFIDAVIT OF ROBBIE L. CAIN
OPEN RECORDS OFFICER– COUNTY OF BUCKS**

I, Robbie L. Cain, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. I serve as the Agency Open Records Officer (“AORO”) for the County of Bucks (“Agency”) and am responsible for responding to Right-to-Know requests filed with the County of Bucks.
2. In my capacity as the AORO, I am familiar with the records kept by the County of Bucks and those kept by the Bucks County Board of Election.
3. I am also familiar with the pending appeal by Kathleen Gallagher searching for the following records:
 1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
 2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
 3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
 4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
 6. Any and all documents reflecting the procedure used to count, process, cure, or reject mailin or absentee ballots for the 2020 General Election.
 7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
 8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
 9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.
4. On October 27, 2021, the Bucks County Office of Open Records received the above mentioned Right-to-Know request.
 5. In addition to Ms. Gallagher's request, we received the following instructions:
 1. The term "Document" shall mean all communications, letters, emails, electronic files, ESI (defined below)¹, correspondence, memoranda, notes, work papers, charts, reports, ledgers, drawings, plans spreadsheets, specifications, contracts, or photographs, and shall include but shall not be limited to, any written, printed, typed or other graphic matter of any kind or nature, all mechanical, magnetic, and electronic sound recordings or transcripts thereof, all microfilm, microfiche, or other reproductions, and all data, images, information or statistics contained within any data storage medica (including hand-held personal digital assistant (PDA) devices, Dictaphones, tapes, disks, CDs, or other electronic storage devices), or other information retrieval storage systems (including computer-

¹ Please note, ESI was not defined below.

generated reports and printouts). It shall also mean all drafts and/or copies of documents by whatever means made.

2. The term "absentee ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3302.

3. The term "mail-in ballot" shall be used in the same manner as provided for in the Pennsylvania Election Code at 25 P.S. § 3150.12.

4. The terms "cure" or "curing" shall mean the ability or availability of a voter to correct an omission or error on their mail-in ballot or ballot envelope(s) after the voter returns their ballot, including any communications to impacted voters about this process.

5. The term "Pennsylvania Department of State, Bureau of Elections" shall include any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State, Bureau of Elections.

6. To the extent you seek to withhold or withhold production of any document on behalf of any claim of "privilege," please identify the legal basis for the same and the identification of any documents so withheld.

6. On November 4, 2021, this Office denied Ms. Gallagher's request pursuant Section 703 of the RTKL which states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested."
7. On November 19, 2021, Ms. Gallagher filed the current appeal.

The request is insufficiently specific.

8. Paragraphs 1, 2, 3, and 8 are insufficiently specific and this Office is unable to limit the scope of the search for records because:
 - a. it seeks any and all communications and fails to set any real limitations by identifying a specific transaction or activity,
 - b. the request fails to limit the scope of the search as it fails to limit the number of people's communications searched and fails to name specific people's communications to be searched,
 - c. and it fails to identify a finite period of time from which the records are sought.
9. Additionally, to the extent that Ms. Gallagher expands the meaning of "documents" to include "all communications, letters, emails . . . correspondence," in paragraphs

- 4, 5, 6, 7, and 9, this Office is unable to limit the scope of the search for records because these paragraphs fail to identify a discrete group of type of documents or recipients or senders and a finite period of time.
10. This Office is unable to limit the scope of the search because the requests seeks any and all communications and this creates too large of a universe of records to search.
 11. Additionally, Ms. Gallagher's request fails to identify a specific transaction or activity in order to conduct a search for records because the phrase "relating to processing, curing, or rejection of mail-in or absentee ballots" is overly broad.
 12. The request fails to limit the scope of the search as it fails to limit the number of people's communications and fails to name specific people's communications to be searched by failing to name any recipients or senders.
 13. The Bucks County Board of Election currently has 15 employees which include one Director, one Assistant Director, one VR Office Supervisor, one Election Coordinator, one Assistant Election Coordinator, one Executive Assistant, two Election Specialists, and seven Registrars.
 14. During the November 2020 election approximately 35 additional employees were hired.
 15. Additionally, the request seeks communication from Pennsylvania Department of State which, according to requester, includes any and all employees, agents, representatives or third-party vendors of the Pennsylvania Department of State.
 16. Without knowing specific employees from the Pennsylvania Department of State, it is almost impossible to conduct a search for any communications from the Department of State.
 17. For example, if we attempted a search for email communications, without specific people named from the Pennsylvania Department of State, this office could not conduct a search that is limited to only senders from the Department of State.
 18. With few exceptions, any office, department, or agency within the government of the Commonwealth of Pennsylvania utilizes the "pa.gov" domain and there is no way to differentiate between an email sent from the "pa.gov" domain that originated within the Pennsylvania Department of State or the other approximately 86 offices, departments, and agencies that utilize the "pa.gov" domain.

19. All paragraphs of the request are insufficiently specific because they fail to indicate a time period to search.
20. Ms. Gallagher's requests are insufficiently specific as it seeks a large universe of records (i.e. "any and all communications), it lacks any limitations on senders and recipients, and fails to identify a finite period of time for which the records are sought, therefore, this Office is unable to conduct a reasonable search for responsive records.

The Right-to-Know law is inappropriate for the requested records in paragraphs 4, 5, 6, 7, and 9.

21. Section 3101.1 of the Right-to-Know law states that "[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply." 65 P.S. § 67.3101.1
22. Section 2622 of the Pennsylvania Election Code states the following:

The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employees having duties to perform thereto: **Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act.**

25 P.S. § 2648 (emphasis added).

23. As the Pennsylvania Election Code establishes the procedure to access election records and what types of records are subject to inspection, any

request for access to these types of records must be made pursuant to the provisions of the Election Code and not under the Right-to-Know Law.

24. To the extent that the records sought in paragraphs 4, 5, 6, 7, and 9 are available on a publicly accessible website, the request is inappropriate as a Right-to-Know request.
25. The election manual is publicly available on our website <https://www.buckscounty.gov/DocumentCenter/View/237/Election-Official-Manual-PDF> and is the same version used in 2020.
26. For the reasons above, Ms. Gallagher's request is insufficiently specific and this Office is unable to conduct a reasonable search for responsive records and Ms. Gallagher's request is not appropriate as a Right-to-know request because it is governed by the Pennsylvania Election Code, which establishes the procedure to access election records, and the records sought are available on a publicly accessible website.

Date: 12/3/21

Signature: /s/ Robbie L. Cain
Robbie L. Cain, Esquire
Agency Open Records Officer
County of Bucks

EXHIBIT E



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

KATHLEEN GALLAGHER AND THE
REPUBLICAN NATIONAL COMMITTEE,
Requester

v.

BUCKS COUNTY,
Respondent

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Docket No: AP 2021-2528

INTRODUCTION

Kathleen Gallagher, Esq., on behalf of the Republican National Committee (collectively “Requester”), submitted a request (“Request”) to Bucks County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to the 2020 General Election. The County denied the Request, arguing that it is insufficiently specific, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On October 27, 2021, the Request was filed, seeking:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

The Requester also submitted a six-part definitional section, which, among other things, provided examples of responsive documents, noted that the Request included communications sent by third-party vendors of the Department of State, and referenced the Pennsylvania Election Code, 25 P.S. §§ 2601 *et seq.*, with regard to the definitions of several terms used in the Request. When the County did not respond to the Request by November 3, 2021, it was deemed denied on that date. *See* 65 P.S. § 67.901. On November 4, 2021, the County purported to deny the Request, arguing that it is insufficiently specific to enable a response. *See* 65 P.S. § 67.703.

On November 19, 2021, the Requester appealed to the OOR, challenging the purported denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 3, 2021, the County submitted a position statement, reiterating its argument that the Request is insufficiently specific and that access to records responsive to Items 4, 5, 6, 7, and 9 of the Request is governed by the Election Code, 25 P.S. § 2648, and not the RTKL. *See* 65 P.S. § 67.3101.1 (“[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.”). The County also submitted a statement made under the penalty of unsworn verification by Robbie Cain, Esq., the County’s Open Records Officer. The County also provided a link to the election manual that is available on its website.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the

¹ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

request” and may consider testimony, evidence, and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The appeal is moot in part

As a preliminary matter, the OOR notes that the County has provided a link to its election manual, which it argues is responsive, at least in part, to Items 4, 5, 6, 7, and 9. *See* 65 P.S. §

67.704(b)(1) (“an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means....”). Accordingly, insofar as it seeks that manual, the appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Request is sufficiently specific in part

The County argues that the Request is insufficiently specific. *See* 65 P.S. § 67.703. In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request identifies (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep’t of Educ.*, 119 A.3d at 1125.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* The subject matter should provide a context to narrow the search. *Id.* (citing *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (*en banc*)). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.*

Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. “The timeframe prong is ... the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.* Failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad. *See Pa. Hous. Fin. Agency v.*

Ali, 43 A.3d 532, 536 (Pa. Commw. 2012) (concluding request for proposals and sales agreements relating to two specific projects that did not specify timeframe was sufficiently specific). Similarly, an extremely short timeframe will not rescue an otherwise overbroad request. *Cf. Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. 2011) (finding request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012).

Here, as far as subject matter, Items 1, 2, 4, 5, 6, 8, and 9 identify the agency activities of counting, processing, curing, or rejecting mail-in or absentee ballots; Items 3 and 5 mention training related to the election; and Item 7 mentions the canvass.² The scope for Items 1, 2, and 3 is communication between the County and the Department; Item 8 seeks communications to and from the County Board of Elections. While, as the County points out, the Request does not include a timeframe, its focus is the 2020 General Election; thus, the Request implies a limited timeframe. *See Iverson*, 50 A.3d at 284 (“[T]he specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.”) (internal citation omitted).

The County argues that the Items fail to identify a specific transaction or activity, as “relating to counting, processing, curing, or rejection of mail-in or absentee ballots” is overly broad. However, counting, processing, curing, or rejecting mail-in or absentee ballots are undoubtedly County activities; as such, they provide context to narrow the search. While burden may be a factor in determining that a request is insufficiently specific, the fact that a request is burdensome does not, in and of itself, deem it overbroad. *See Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012).

² “Canvass” is defined by the Election Code as “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(a.1).

Recently, the OOR found that a request for “any and all electronic correspondence” between an agency and the Department of State about absentee ballot cure procedures over the span of nearly a year to be sufficiently specific, with one exception. *Snead v. Phila. Office of the City Commissioners*, OOR Dkt. AP 2021-0160, 2021 PA O.O.R.D. LEXIS 426 (“*Snead I*”); but see *Snead v. Montgomery Cnty.*, OOR Dkt. AP 2021-0157, 2021 PA O.O.R.D. LEXIS 409 (“*Snead I*”) (finding insufficiently specific a request that was nearly identical to the request in *Snead II* because the agency had attempted a search for responsive record that returned over 50,000 results). In *Snead II*, the agency argued that Department employees do not have a unique domain name that could limit the scope of that request. The OOR found this argument unavailing, holding that a limited subject matter may counteract a broad scope.

The County raises a nearly identical argument in the instant matter; while the Request seeks records related to counting, processing, and rejection of mail-in or absentee ballots in addition to absentee ballot cure procedures, the fact remains that the Request does identify County activities. Therefore, difficulty distinguishing Department employees by domain name does not render the Request insufficiently specific.

The County also argues that, in the absence of the identification of specific individuals in the Department, it cannot conduct a reasonable search; however, the request in *Snead II* did not identify individuals and that agency employed 140 individuals with 60 email accounts. Here, the County Board of Elections currently has 15 employees and an additional 35 employees were hired during the election. Cain Aff. ¶¶ 13-14. Consequently, while the subject matter in the instant Request is broader than that in *Snead II*, the universe of potentially responsive records is much more limited. See *Legere*, 50 A.3d at 264-65 (holding that, because a request delineated “a clearly-defined universe of documents[,]” there was no need to make judgment calls as to whether any

records were related to the request). Further, unlike the agency in *Snead I*, the County provides no evidence that it has attempted a search. Therefore, since Items 1, 2, 3, and 8 identify County activities, are limited in scope and contain an implied timeframe, they are sufficiently specific to guide the County's search for responsive records.

However, Items 4, 5, 6, and 7 seek "any and all documents" "reviewed or utilized" (Item 4), "regarding and/or relating to" (Item 5), "reflecting" (Item 6), and "relied upon and/or referred to" (Item 7) the identified activities. Similarly, Item 9 seeks "any plan, documents, training materials, or other materials." Furthermore, the definitional section accompanying the Request devotes a half-page expounding upon the inclusivity of "document." Such expansive language does not meaningfully limit the Request. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (holding that the portion of a request seeking "any and all records, files or communications" related to vehicle stops, searches, and seizures was insufficiently specific, but that the portion of the request seeking manuals was sufficiently specific.); *see also Snead II* (finding that the portion of the request seeking "any variation" of the provided key words was insufficiently specific).

These Items of the Request would require the County to make judgments as to whether a given record was "reviewed or utilized," "regard[s] and/or relat[es] to," or was "relied upon and/or referred to." The OOR has repeatedly held that a request that requires an agency to make judgments as to whether each potentially responsive record is properly "related to" a request is insufficiently specific. *See, e.g., Brown v. Office of the Governor*, OOR Dkt. AP 2017-1118, 2017 PA O.O.R.D. LEXIS 996. Therefore, Items 4, 5, 6, 7, and 9 are insufficiently specific to enable the County to locate responsive records.³

³ The County also argues that the Election Code establishes the procedure to access records responsive to these Items. The Election Code makes many records in the custody of the Election Board subject to public inspection by qualified

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part, and dismissed as moot in part**, and the County is required to produce records responsive to Items 1, 2, 3, and 8 within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Kathleen Gallagher; Robbie Cain, Esq.

electors. See 25 P.S. § 2648; *Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing that section of the Election Code and noting that it “creates a separate process for obtaining these records and conditions public inspection and copying.”). Because the records are not unconditionally public under the Election Code, the OOR must examine any exemptions from disclosure under the RTKL that are asserted by an agency. See *Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014). Because the County only argues that the Election Code applies to the Items that are insufficiently specific, the OOR need not address the issue.

⁴ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).