Case# 2022-11732-0 Docketed at Montgomery County Prothonotary on 06/15/2022 3:16 PM, Fee = $294.25. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MONTGOMERY COUNTY

vs.

HEATHER HONEY

NO. 2022-11732

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: JOSHUA M STEIN, Esq., ID: 90473

Self-Represented (Pro Se) Litigant [ ]

Class Action Suit [ ] Yes [X] No

MDJ Appeal [ ] Yes [X] No

Money Damages Requested [ ]

Commencement of Action:

Notice of Appeal

Amount in Controversy:

Case Type and Code

Civil Appeals:

Other

Other: NOTICE OF APPEAL OF FINAL DETERMINATION OF PA

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

MONTGOMERY COUNTY P.O. BOX 311 NORRISTOWN, PA 19401 *Appellant,*	:	
v.	:	RIGHT TO KNOW LAW APPEAL
HEATHER HONEY 1451 QUENTIN ROAD SUITE 400-199 LEBANON, PA 17042 *Appellee.*	:	Docket No.:

NOTICE OF APPEAL

Appellant, Montgomery County, hereby appeals the Final Determination of the Pennsylvania Office of Open Records ("OOR") dated MAY 18, 2022, Docketed at AP-2022-0453, a copy of which is attached hereto as Exhibit "A."

Respectfully submitted:

JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

Dated: 6/15/2022

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VERIFICATION

I, Joshua M. Stein, Esquire, am the Solicitor of Montgomery County, and I verify that the facts set forth in the foregoing Notice to Appeal are true and correct to the best of my knowledge, information and belief.

I understand that false statements herein made are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

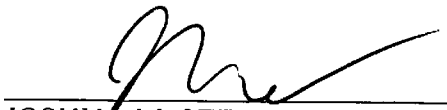
Dated: 6/15/2022

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CERTIFICATE OF COMPLIANCE

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

Submitted by:



JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County
Attorney I.D. No.: 90473

Dated: 6/15/2022

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pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
HEATHER HONEY,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-0453**
	:	
MONTGOMERY COUNTY,	:	
Respondent	:	

INTRODUCTION

Heather Honey ("Requester") submitted a request ("Request") to Montgomery County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records related to mail-in voting. The County provided a link to its website where some responsive information is available, but denied the remainder of the Request, arguing that access to responsive documents is governed by the Election Code and that the disclosure of certain records is reasonably likely to threaten personal security and public safety. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On December 15, 2021, the Request was filed, seeking digital copies of the following records from the 2020 General Election:

1. Please provide electronic copies of all chain of custody documents related to the retrieval of ballots from drop boxes.

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2. Please provide all documents showing when the ballots were retrieved from the drop boxes and how they were transported.

3. Please provide a list of all ballot drop boxes used in the 2020 General Election and the days and hours they were available.

4. Please provide a list of all satellite voting locations used in the 2020 General Election and the days and hours they were available.

5. Please provide electronic copies of all chain of custody documents related to the retrieval of ballots from satellite voting locations.

6. Please provide all documents showing when the ballots were retrieved from the satellite locations and how they were transported.

7. Please also provide chain of custody documents and inventory records associated with ballots, blank ballot paper and ballot envelopes delivered to satellite voting centers. Please include the total ballots and envelopes delivered, the total number spoiled and the total number unused and returned when the satellite location was closed. Please also include the number of sheets of blank ballot paper, the number used, the number spoiled and the number returned for each satellite voting location.

8. Please provide copies of all procedures and training materials used to train people in the requirements for secure ballot retrieval from drop boxes and satellite voting locations.

On December 23, 2021, the County invoked a thirty-day extension to respond. See 65 P.S. § 67.902. On January 24, 2022, the County provided a link to its website where information responsive to Items 3 and 4 is available. *See* 65 P.S. § 67.704(b). However, the County denied Items 1-2 and 5-7, arguing that access is government by Pennsylvania's Election Code, 25 P.S. § 2648. The County also provided the Voter Public Information Data Request, which could be submitted to the County's Office of Voter Services. Additionally, the County argued that the disclosure of records responsive to Item 8 would be reasonably likely to threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)(i)-(2).

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On February 14, 2022, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.[1] Specifically, the Requester argues that the Election Code renders records publicly available and that the information on the County's website was not the information she requested. 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 March 7, 2022, the County submitted the statement made under the penalty of perjury by Joshua Stein, Esq., the County's Solicitor. On the same day, the Requester also submitted a statement made under the penalty of perjury.

LEGAL ANALYSIS

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

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence, and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing

[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).

NOTICE OF APPEAL EXHIBIT 'A'

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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. Access to records responsive to Items 1-2 and 5-7 is governed the Election Code

The County argues that access to records responsive to Items 1-2 and 5-7 is governed by Article III of the Election Code.[2] Specifically, the County asserts that Section 2648 of the Election Code proscribes the way in which responsive records may be accessed.

[2] Section 3150.17 of the Election Code provides that "All official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear, and *all information and lists* are designated and declared to be

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The Election Code provides:

> The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employes have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act: And provided further, That general and duplicate returns, tally papers, affidavits of voters and others, and all other papers required to be returned by the elections officers to the county board sealed, shall be open to public inspection only after the county board shall, in the course of the computation and canvassing of the returns, have broken such seals and finished for the time, their use of said papers in connection with such and canvassing.

25 P.S. § 2648. The County argues that the provisions of the Election Code conflict with the RTKL, so the RTKL should not apply. *See* 65 P.S. § 67.3101.1 ("If the provisions of the [RTKL] regarding access to records conflict with any other federal or state law, the provisions of the [RTKL] shall not apply.").

There is no dispute that the records sought in Items 1-2 and 5-7 are generally public under the Election Code. Instead, the County argues that it believes that the Requester is not a qualified elector based on the address provided on her appeal form. The County has not set forth definitive evidence on that issue, and the governance of inspection and copying under the Election Code are beyond the OOR's purview. *See Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 831-33 (Pa. Commw. Ct. 2014) (noting that the OOR is not in a position to enforce conditions on public access

public records." 25 P.S. § 3150.17(a) (emphasis added). The Requester argues that "information and lists" include chain of custody records. However, subsection (b) discusses the names and addresses of applicants for mail-in ballots and the dates applications for mail-in ballots, decisions on these applications are received and processed and the dates the ballots are mailed. *Id.* at (b). Though it appears that no court has addressed the issue, a plain reading of the statute as a whole indicates that it applies to the information specified in subsection (b).

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imposed by another law, and that there is a difference between statutes establishing the public *nature* of records and statutes that also proscribe a means of access). While the County has provided a Voter Information Request Form, the Election Code itself does not proscribe a means of requesting the records. Accordingly, the RTKL request is a proper vehicle for requesting records in the County's possession. *See* 65 P.S. § 67.703 (written requests for access to records). Nevertheless, the records are clearly governed by the access provisions set forth in the Election Code, and the County is directed to provide access to any records to which the Requester is entitled as set forth in that law. *See Hetzel, supra.*

2. Records responsive to Item 8 are not reasonably likely to threaten personal security and public safety

The County argues that the disclosure of records responsive to Item 8 would be reasonably likely to threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)(ii)-(2). Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii). Under the RTKL, "reasonable likelihood" of "substantial and demonstrable risk" is necessary to trigger the personal security exception. *Del. Cnty. v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012).

Meanwhile, Section 708(b)(2) of the RTKL exempts from disclosure "[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity." 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the County must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw.

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Ct. 2013). The term, "substantial and demonstrable risk" is not defined in the RTKL; however, "reasonably likely" has been interpreted as "requiring more than speculation." *Id.* at 375. In order to show a reasonable likelihood, "[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]." *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has "defined substantial and demonstrable [risk] as actual or real and apparent." *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (quoting *Carey*, 61 A.3d at 373).

Here, Attorney Stein attests:

> 21. … [T]he secure ballot retrieval from drop boxes and satellite voting locations are conducted by Montgomery County Sheriffs, and these records relate to law enforcement or public safety activity, and should these records be disclosed under the Right-to-Know Law, it is reasonably like[ly] that the disclosure itself is a security risk to Montgomery County voters and the Sheriff's Department employees who are responsible for the chain of custody of these ballots.
>
> 22. The secure ballot procedures and training materials are used to train Montgomery County Sheriffs, who are members of law enforcement.
>
> 23. The disclosure of these records would be reasonably likely to threaten public safety or a public protection activity because these materials contain security-sensitive information which would threaten a safe and secure ballot retrieval, should these records be disclosed.
>
> 24. Should the County release the procedures and training materials for the Sheriffs, theoretically, a person could easily manipulate the information contained in the Training Materials to adversely affect the personal safety and security of the Sheriffs and the drop boxes and/or Satellite voting locations themselves.
>
> 25. The release of the secure ballot procedures and training materials would give individuals advance notice of the times and locations where law enforcement will be present to collect live ballots, which could equip individuals to counteract and present a dangerous risk of harm to the Sheriffs responsible for ballot retrieval and/or compromise the ballots themselves.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

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However, while Attorney Stein attests that these procedures and training manuals contain sensitive security information that could be manipulated to threaten voters, he does not elaborate on what exactly that sensitive information is or link disclosure with any particular threat. Positing that release of these records would give individuals advance notice of times when law enforcement would be collecting ballots ignores the fact that the Request relates to the 2020 General Election; there is no evidence that the same schedules will apply to future elections. Further, the County has not provided any evidence from the Sheriff's Department, the entity whose employees are directly implicated by this Item of the Request. Accordingly, the County has not met its burden of proving that the disclosure of these records would be reasonably likely to threaten personal security and public safety. *See Snover v. Northampton Cnty.*, OOR Dkt. AP 2021-0080, 2021 PA O.O.R.D. LEXIS 379 (finding that the agency did not prove that disclosure of video footage of election drop boxes was reasonably like to jeopardize safety or security where the agency did not link the disclosure to any particular threat).

3. The County reasonably interpreted Items 3 and 4

The Requester argues that the links the County provided in response to Items 3 and 4 of her Request were not responsive; rather, she wanted the dates and times the locations were actually open and in use. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Garland v. Pa. Dep't of Env't Prot.*, OOR Dkt. AP 2017-1490, 2017 PA O.O.R.D. LEXIS 1310; *Ramaswamy v. Lwr. Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR's task on appeal is to determine if the agency's interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095. The OOR determines this from the text and context of the request alone, as neither the OOR nor the requester is permitted to alter a

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request on appeal. *See McKelvey v. Office of the Att'y Gen.*, 172 A.2d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Dep't of Envtl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

Items 3 and 4 sought lists of all ballot drop boxes used and all satellite voting locations, along with the days and hours they were available. In response to these Items, the County provided a link to its website listing secure drop box locations with dates and hours they were available. *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…."). The use of the phrase "when they were available," especially when contrasted with the language of Item 2, which sought documents showing when the ballots were retrieved, indicates that these Items sought information listing the drop box locations and dates of availability. As there was no indication that Items 3 and 4 related to the retrieval of ballots, the County reasonably interpreted the Request and responded appropriately. However, nothing in this Final Determination prevents the Requester from filing a new RTKL request with the County for the information sought.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the County is required to make records responsive to Items 1-2 and 5-7 available for access in accordance with the Election Code and provide all records responsive to Item 8. 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 Montgomery 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

NOTICE OF APPEAL EXHIBIT 'A'

should not be named as a party.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: May 18, 2022

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

Sent via email to: Heather Honey, Joshua Stein, Esq., and Lauren Raikowski

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

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Case# 2022-11732-1 Docketed at Montgomery County Prothonotary on 06/15/2022 3:24 PM, Fee = $0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

MONTGOMERY COUNTY *Appellant,*	:	
v.	:	RIGHT TO KNOW LAW APPEAL
HEATHER HONEY *Appellee.*	:	Docket No.:

CERTIFICATE OF SERVICE

I, Joshua M. Stein, Esquire, Solicitor for Montgomery County, hereby certify that a true and correct copy of the within Notice of Appeal of Montgomery County was forwarded via e-mail and via U.S. First Class Mail to:

Heather Honey
1451 Quentin Road
Suite 400-199
Lebanon, PA 17042
hhoney@haystackinvestigations.com

Blake Eilers Esquire
Appeals Officer
Office of Open Records
Commonwealth of Pennsylvania
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
beilers@pa.gov

JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

Dated: 6/15/2022