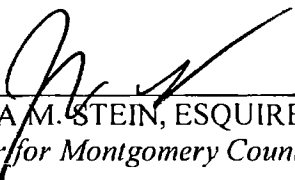

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

MONTGOMERY COUNTY	:	
<i>Appellant,</i>	:	
v.	:	RIGHT TO KNOW LAW APPEAL
	:	
HEATHER HONEY	:	Docket No.: 2022—11732
<i>Appellee.</i>	:	
	:	

REQUEST FOR BRIEFING SCHEDULE/ORAL ARGUMENT

Appellant, Montgomery County, respectfully requests a briefing schedule in order to submit a brief on the issues herein and oral argument on its Petition Requesting Judicial Review of a Final Determination dated May 18, 2022, of the Office of Open Records of the Commonwealth of Pennsylvania.

Respectfully submitted:



JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

Dated: 6/15/2022

MONTGOMERY COUNTY SOLICITOR'S OFFICE

By: Joshua M. Stein, Esquire
Attorney I.D. No.: 90473
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
jstein1@montcopa.org
(610) 278-3033

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

MONTGOMERY COUNTY	:	
<i>Appellant,</i>	:	
v.	:	RIGHT TO KNOW LAW APPEAL
	:	
HEATHER HONEY	:	Docket No.: 2022-11732
<i>Appellee.</i>	:	
	:	

**PETITION FOR JUDICIAL REVIEW OF A FINAL DETERMINATION OF THE
OFFICE OF OPEN RECORDS FOR THE COMMONWEALTH OF PENNSYLVANIA**

Appellant, Montgomery County, ("County") by and through the County Solicitor, Joshua M. Stein, Esquire, respectfully files this Petition for Judicial Review and avers the following:

1. The County Appellant is a political subdivision of the Commonwealth of Pennsylvania and a Class 2A county, and governed by the County Commissioners. The County Appellant has a principal office at One Montgomery Plaza, Suite 800, Norristown, PA 19404-0311 and is a "Local Agency" as that term is defined in the Pennsylvania Right-to-Know Law ("RTKL") *See* 65 P.S. §67.102 and §67.302.

2. Based upon information and belief, the Appellee, Heather Honey, is an adult individual with a business address of 1451 Quentin Road, Suite 400-199, Lebanon, PA 17042.

3. The following is a timeline of the communication between the Appellant, Heather Honey, and the Pennsylvania Office of Open Records ("OOR"), attached hereto, incorporated herein and labeled as follows:

4. On December 14, 2021, Appellee filed a RTKL Request pursuant to 65 P.S. §67.101 *et seq.*, with Montgomery County 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.
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.”

A copy of the original RTK Request filed by Ms. Honey is attached hereto as Exhibit “A.”

5. On December 23, 2021, the County requested a 30-day extension of time in which to respond to the Request.

6. On January 24, 2022, the County issued its formal response, denying access to Requests Nos. 1 through 2 because access to these records is provided under the Pennsylvania Election Code, which is another statute other than the RTKL. The County granted access to Requests Nos. 3 and 4, as the responsive records were publicly available on the County website. The County denied Requests Nos. 5 through 7 as because access to these records is provided under the Pennsylvania Election Code, which is another statute other than the RTKL. Lastly, the

County denied access to Request No. 8 as the manual and its attachments under Sections 708(b)(1)(ii) and 65 P.S. § 67.708(b)(2) of the RTKL. The County further provided the Requester with its Voters Services Public Information Data Request form to request access under the Pennsylvania Election Code. A copy of the County's response letter is attached hereto as Exhibit "B."

7. On February 14, 2022, Appellee appealed to the OOR, arguing that she was entitled to Drop Box Chain of Custody Records, Chain of Custody Records for distribution of Election Materials, County Procedures and Guidelines for Drop Box Retrieval, Records of the Dates of Operation of Drop Boxes and Satellite Voting Locations (not necessarily the same as the scheduled dates of operation - the request was for a record of the actual dates of operation). A copy of the appeal is attached hereto as Exhibit "C."

8. On March 7, 2022, Appellant County, submitted an Affidavit signed by Solicitor, Joshua M. Stein, reiterating its arguments that many of the records requested were subject to the access provisions of Section 2648 of the Pennsylvania Election Code and in response to Request No. 8, the County explained that the 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 activities, and should these records be disclosed under the Right-to-Know Law, it is reasonably likely 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. A copy of the Affidavit submitted is attached as Exhibits "D."

9. On May 18, 2022, the OOR issued its Final Determination under Docket No.: AP-2022-0453 which is attached hereto as Exhibit "E."

ARGUMENT

10. The Final Determination issued by the OOR Appeals Officer in this case is erroneous as a matter of law, conflicts with another similar Final Determination recently issued by the Office of Open Records, and conflicts with Election Infrastructure (EI) protections designated by the U.S. Department of Homeland Security (DHS) and federal law. The OOR correctly held that Records responsive to Request Nos. 1-2 and 5-7 are available in accordance with the access provisions of the Pennsylvania Election Code; however, it erred in ordering the County to provide all records responsive to Request No. 8, which are solely at issue in this appeal *de novo*. See *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453 (2013).

11. The County contends that Records responsive to Request No. 8 are exempt under several of the RTKL's security-related exemptions, reiterates that the disclosure of these records presents a security risk to law enforcement and critical infrastructure, and would likely jeopardize the security of Election Infrastructure ("EI"), which is also protected by the federal Critical Infrastructures Protection Act of 2001, 42 U.S. §5195c.

12. The County contends on this appeal *de novo* that the documents at issue in Request No. 8 are also exempt from disclosure under Section 708(b)(3) of the RTKL in addition to the law enforcement and public safety exemptions asserted.

13. Section 708(b)(3) of the RTKL exempts the following from access:

(3) [a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of ...infrastructure, facility or information storage system, which may include:

- (i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act.
- (ii) *lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National*

Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

- (iii) ...infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. §§ 67.708(b)(3)(i)-(iii). (Emphasis added).

14. Recently, as explained in the OOR's Final Determination issued in *Sheckler v. Pennsylvania Department of State*, O.O.R. Dkt. No.: 2022-0492, the OOR held that SURE system User Guides are a part of the national critical infrastructure and election infrastructure, and after considering the submission of Mr. Marks, the OOR reasons that "[the disclosure of the User Guide would be reasonably likely to endanger the safety and security of the SURE system and related computer security because it would provide a "roadmap" for how to circumvent SURE system protections, which in turn would leave data in the system vulnerable to manipulation if hacked and jeopardize the electoral process in the Commonwealth. Disclosure of the User Guide, according to Mr. Marks, would also likely lessen the Department's ability to mitigate a cyber-attack should one occur and to keep the SURE system safe." See, *Linda Sheckler v. Pennsylvania Department of State*, O.O.R Dkt. No.: AP-2022-0492, available at OOR - Docket Sheet (pa.gov).

15. The Records at issue in this appeal under Request No. 8, for "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" are to be withheld from public disclosure for the same reasoning as the SURE User Guide since the disclosure of these documents carry the same security risks, as the disclosure would provide a "roadmap" for how to circumvent secure ballot

retrieval from drop boxes and satellite voting locations, and in addition would jeopardize the safety of our Sheriffs and the electoral process in Montgomery County, Pennsylvania.

16. Not only would the disclosure of the procedures and training materials compromise Election Infrastructure, it would also jeopardize the safety and security of the law enforcement activities and public safety activities of the Sheriffs who are charged to securely transport the live ballots from the drop box and satellite voting locations.


17. The disclosure of the procedures and training materials related to the Dropboxes and satellite voting locations would disclose how and when the Dropboxes are opened and securely locked and by whom, how and where and when the Dropboxes are monitored, and how and when the ballots are stored within and collected from the Dropboxes themselves. All of this information, if disclosed, would potentially allow a person to manipulate or circumvent these processes and compromise election security.

18. Similarly, as more fully explained in the submitted affidavits and Final Determination issued in *Sheckler*, Montgomery County argues on appeal in the instant matter that Dropboxes would fall under the definition of Election Infrastructure as “Voting systems and associated infrastructure” and “Storage facilities for election and voting system infrastructure.” The Satellite voting locations are already defined as Election Infrastructure under “Polling places, to include early voting locations.” As Election Infrastructure under 42 U.S.C. § 5195c(e), the policy and procedures manuals themselves are exempt from disclosure under federal law; therefore, the RTKL does not apply and the Final Determination, dated May 18, 2020, under Docket No. 2022-0453 with respect to its directives to Request No. 8 must be vacated and reversed as it conflicts with federal law and another Final Determination issued by the OOR.

19. In the alternative, since the responsive records sought are subject to the confidentiality provisions of a federal statute that protects Election Infrastructure, the provisions of the RTKL should have never applied to Request No. 8, and the OOR should have ruled that it lacked jurisdiction to grant the Request No. 8 in the first place. *See* 65 P.S. §67.3101.1 (“If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e RTKL] shall not apply.”).

WHEREFORE, the Appellant prays that this Honorable Court reverse the Final Determination of the OOR Appeals Officer with respect to Request No. 8 and deny Appellee’s Request No. 8 as exempt at Election Infrastructure, or in the alternative, vacate the portion of the determination of the OOR Appeals Officer with respect to Request No. 8 and remand this matter for a new Final Determination after the relevant parties are provided with a full opportunity to present competent evidence, challenge evidence presented by the ~~other~~ side, and make legal arguments at a hearing to be conducted by the OOR Appeals Officer, with a full and complete record to be made of any and all proceedings before the OOR.

Respectfully submitted:



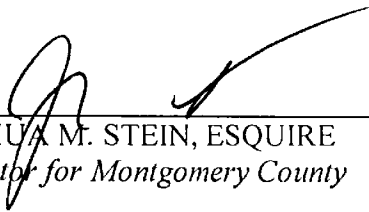
JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

Dated: 6/15/2022

VERIFICATION

I, Joshua M. Stein, Esquire, am the Solicitor of Montgomery County, and I verify that the facts set forth in the foregoing document 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.



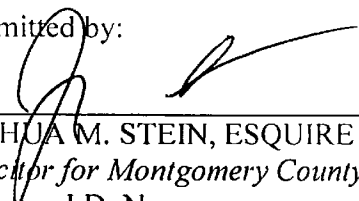
JOSHUA M. STEIN, ESQUIRE
Solicitor for Montgomery County

Dated: 6/15/2022

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.:

Dated: 6/15/2022

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

MONTGOMERY COUNTY

Appellant,

v.

HEATHER HONEY

Appellee.

:
:
:
:
:
:
:

RIGHT TO KNOW LAW APPEAL

Docket No.: 2022—11732

CERTIFICATE OF SERVICE

I, Joshua M. Stein, Esquire, Solicitor for Montgomery County, hereby certify that a true and correct copy of the within Petition for Judicial Review of a Final Determination of the Office of Open Records for the Commonwealth of Pennsylvania 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

Heather Honey

From: noreply@civicplus.com
Sent: Wednesday, December 15, 2021 10:26 PM
To: Heather Honey
Subject: Online Form Submittal: Open Records Request Form

Open Records Request Form

County's Open Records Officer may be contacted as follows:

Joshua M. Stein
County Solicitor
Montgomery County Solicitor's Office
One Montgomery Plaza
Suite 800
Norristown, PA 19404-0311
Phone: 610-278-3033
Fax: 610-278-3069
openrcrd@montcopa.org

Date of Request	12/15/2021
Name of Requester	Heather Honey
Address1	1451 Quentin Road
Address2	Suite 400-199
City	Lebanon
State	PA
Zip	17042
Telephone	6102204822
Email Address	hhoney@haystackinvestigations.com
Records Requested	<p>I am requesting digital copies of the following records from the 2020 General Election:</p> <ol style="list-style-type: none">1. Please provide electronic copies of all chain of custody documents related to the retrieval of ballots from drop boxes.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.

Thank you,
Heather Honey

Do You Want Copies? Yes

Do You Want To Inspect
The Records? No

Do You Want Certified
Copies of Records? No

For Internal Use Only
Date Received By County Open Records Office:

Five (5)-Day Response Due Date:

Applicable Fees:

Noticed Required
District Attorney: YES / NO

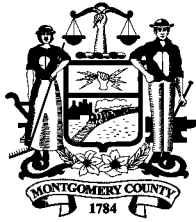
Other Law Enforcement: YES / NO

Proprietary or Trade Secret: YES / NO

Personal Privacy Interest: YES / NO

**MONTGOMERY COUNTY
BOARD OF COMMISSIONERS**

VALERIE A. ARKOOSH, MD, MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE, COMMISSIONER



OFFICE OF THE SOLICITOR

MONTGOMERY COUNTY COURTHOUSE • PO Box 311
NORRISTOWN, PA 19404-0311
610-278-3033
FAX: 610-278-3069 • TDD: 610-631-1211
WWW.MONTCOPA.ORG

January 24, 2022

VIA E-MAIL

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

Re: Right-to-Know Request No. OR21-816

Dear Ms. Honey:

On December 15, 2021, the open-records officer of Montgomery County received your written request for information. The County is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §§ 67.101, *et seq.* (RTKL). You asked for the following:

"I am requesting 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.
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

EXHIBIT 'B'

in the requirements for secure ballot retrieval from drop boxes and satellite voting locations.

Thank you,
Heather Honey”

Under the RTKL, a written response to your request was due on or before December 23, 2021. On December 23, 2021, the County requested a 30-day extension of time in which to respond to your Request.

To the extent such records exist, your request No. 1 is **denied as access to these records is provided under another statute other than the RTKL**. The information requested is exempt from disclosure pursuant to Pennsylvania’s Election Code, 25 P.S. § 2648. Under 25 P.S. § 2648, Montgomery County is arguably prohibited from disseminating voter records, including “electronic copies of all chain of custody documents related to the retrieval of ballots from drop boxes.” The Pennsylvania Election Code establishes the procedure to access election board 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 RTKL. *See, Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). *See*, 25 P.S. § 2648. *See also 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 process for obtaining these records under another statute). Furthermore, RTKL Section 305(a)(3) states that a record is NOT presumed to be a public record if the record is exempt from disclosure under any other State law. *See* 65 P.S. §67.3101.1 (“If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e RTKL] shall not apply.”).

To the extent such records exist, your request No. 2 is **denied as access to these records is provided under another statute other than the RTKL**. The information requested is exempt from disclosure pursuant to Pennsylvania’s Election Code, 25 P.S. § 2648. Under 25 P.S. § 2648, Montgomery County is arguably prohibited from disseminating voter records, including “all documents showing when [sic] ballots were retrieved from the drop boxes and how they were transported.” 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 RTKL. *See, Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). *See*, 25 P.S. § 2648. *See also 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 process for obtaining these records under another statute). Furthermore, RTKL Section 305(a)(3) states that a record is NOT presumed to be a public record if the record is exempt from disclosure under any other State law. *See* 65 P.S. §67.3101.1 (“If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e RTKL] shall not apply.”).

Your Request No. 3 is **granted**. Records concerning “a list of all ballot drop boxes used in the 2020 General Election and the days and hours they were available” are publicly available online at: [Secure Ballot Drop Box Locations | Montgomery County, PA - Official Website \(montcopa.org\)](https://montcopa.org) *See* 65 P.S. § 704(b)(1). *See, Citizens for Pennsylvania’s Future v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2015-0726, 2015 PA O.O.R.D. LEXIS 856. If you are unwilling or unable to access the records you have requested electronically, you may, within 30 days

of receipt of this response, submit a written request to me to have the record converted to paper.

Your Request No. 4 is **granted**. Records concerning "a list of all satellite voting locations used in the 2020 General Election and the days and hours they were available" are publicly available online at: [Secure Ballot Drop Box Locations | Montgomery County, PA - Official Website \(montcopa.org\)](https://montcopa.org) See 65 P.S. § 704(b)(1). See, *Citizens for Pennsylvania's Future v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2015-0726, 2015 PA O.O.R.D. LEXIS 856. If you are unwilling or unable to access the records you have requested electronically, you may, within 30 days of receipt of this response, submit a written request to me to have the record converted to paper.

To the extent such records exist, your request No. 5 is **denied as access to these records is provided under another statute other than the RTKL**. The information requested is exempt from disclosure pursuant to Pennsylvania's Election Code, 25 P.S. § 2648. Under 25 P.S. § 2648, Montgomery County is arguably prohibited from disseminating voter records, including "electronic copies of all chain of custody documents related to the retrieval of ballots from satellite voting locations." 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 RTKL. See, *Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). See, 25 P.S. § 2648. See also *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 process for obtaining these records under another statute). Furthermore, RTKL Section 305(a)(3) states that a record is NOT presumed to be a public record if the record is exempt from disclosure under any other State law. See 65 P.S. §67.3101.1 ("If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e] RTKL shall not apply.").

To the extent such records exist, your request No. 6 is **denied as access to these records is provided under another statute other than the RTKL**. The information requested is exempt from disclosure pursuant to Pennsylvania's Election Code, 25 P.S. § 2648. Under 25 P.S. § 2648, Montgomery County is arguably prohibited from disseminating voter records, including "all documents showing when the ballots were retrieved from the satellite locations and how they were transported." 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 RTKL. See, *Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). See, 25 P.S. § 2648. See also *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 process for obtaining these records under another statute). Furthermore, RTKL Section 305(a)(3) states that a record is NOT presumed to be a public record if the record is exempt from disclosure under any other State law. See 65 P.S. §67.3101.1 ("If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e] RTKL shall not apply.").

To the extent such records exist, your request No. 7 is **denied as access to these records is provided under another statute other than the RTKL**. The information requested is exempt from disclosure pursuant to Pennsylvania's Election Code, 25 P.S. § 2648. Under 25 P.S. § 2648, Montgomery County is arguably prohibited from disseminating voter records, including "chain of custody documents and inventory records associated with

ballots, blank ballot paper and ballot envelopes delivered to satellite voting centers... the total ballots and envelopes delivered, the total number spoiled and the total number unused and returned when the satellite location was closed." 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 RTKL. *See, Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). *See*, 25 P.S. § 2648. *See also 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 process for obtaining these records under another statute). Furthermore, RTKL Section 305(a)(3) states that a record is NOT presumed to be a public record if the record is exempt from disclosure under any other State law. *See* 65 P.S. §67.3101.1 ("If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of th[e RTKL] shall not apply.").

To the extent such records exist, your request No. 8 is **denied**. Your Request for "all procedures and training materials used to train people in the requirements for secure ballot retrieval from drop boxes and satellite voting locations" is denied as any manual and its attachments are exempt under Sections 708(b)(1)(ii) and 65 P.S. § 67.708(b)(2) of the RTKL. Section 708(b)(1)(ii) exempts from disclosure records which "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). 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) All Montgomery County ballot retrieval from drop boxes and satellite voting locations is performed by law enforcement officers from the Montgomery County Sheriff's Department. Montgomery County continues to believe that the disclosure of all procedures and training materials used for secure ballot retrieval from drop boxes and satellite voting locations constitutes a risk to our law enforcement personnel from the Sheriff's Office. Similarly, the OOR has consistently held that PACT Manuals and its attachments are exempt from disclosure under Section 708(b)(1)(ii). *See Howard v. Pennsylvania Department of Corrections*, OOR Dkt. AP-201-1027, 2011 PA O.O.R.D. LEXIS 344; *Smolsky v. Pennsylvania Department of Corrections*, OOR Dkt. AP-2010-0585, 2010 PA O.O.R.D. LEXIS 523, *aff'd* No. 1718 C.D. 2010, 2011 Pa. Cmwlth. Unpub. LEXIS 429 (Pa. Commw. Ct. 2010).

Enclosed please find the Voters Public Information Data Request for your convenience. You may fill out this form and remit it to the email address provided and someone from the Montgomery County Office of Voter Services will be in contact to regarding your request.

You have a right to appeal this denial of information in writing to Elizabeth Wagenseller, Executive Director, Office of Open Records (OOR), 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response; 2) your request; and 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:
<https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,


By: _____
Joshua M. Stein
County Solicitor
Montgomery County Solicitor's Office
One Montgomery Plaza
Suite 800
Norristown, PA 19404-0311
Phone: 610-278-3033
Fax: 610-278-3069
Openrcrd@montcopa.org

Enclosure

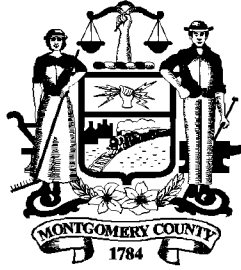
MONTGOMERY COUNTY

BOARD OF ELECTIONS

KENNETH E. LAWRENCE JR., CHAIR

JOSEPH C. GALE, VICE CHAIR VALERIE A.

ARKOOSH, MD, MPH



VOTER SERVICES

PO BOX 311
NORRISTOWN, PA 19404-0311
610-278-3280
FAX: 610-292-4527
WWW.MONTCOPA.ORG

INSTRUCTIONS TO REQUEST VOTER RECORDS

The following lists of public information are available to any qualified registered electors from the Montgomery County Board of Elections pursuant to 25 Pa.C.S. §§1403 and 1404, as well as the SURE Regulations at 4 Pa. Code §§183.13 and 183.14, relating to Street Lists and Public Information Lists.

All request forms must be accompanied by a photocopy of the requestor's government-issued identification in order to confirm registration.

If this request is being made on behalf of an official, a political party, or a candidate, please provide the name of the official, party, or candidate where requested.

Unless otherwise prescribed under the law, all requests will be responded to within ten (10) calendar days after receipt.

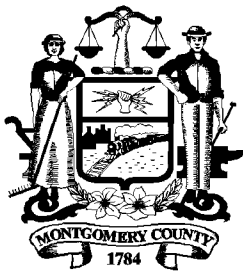
Requests submitted by mail should be addressed to: Montgomery County Voter Services
P.O. BOX 311
Norristown, PA 19404

Requests submitted by email should be sent to: voters@montcopa.org

Case# 2022-11732-2 Docketed at Montgomery County Prothonotary on 06/15/2022 3:35 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.

MONTGOMERY COUNTY
BOARD OF ELECTIONS

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VOTER SERVICES

PO BOX 311
NORRISTOWN, PA 19404-0311
610-278-3280
FAX: 610-292-4527
WWW.MONTCOPA.ORG

REQUEST FOR VOTER RECORDS

Name

Address

Phone

Email

Request is made on behalf of

- ☐ **Public Information List:** This is a listing of all voters in the county and contains name, residential address, mailing address, date of birth and date last voted.
- ☐ **Street List:** This is a listing of all voters in the county and contain name and residential address.
- ☐ **Individual Voter Information:** Please provide as much information as possible to ensure we locate the correct record.

Name

Address

D.O.B

- ☐ **Other:** If the type of record you're looking for isn't listed above, please use the following box and describe the record you're looking for with as much detail as you can. A staff member may contact you if we require additional information.

Affirmation

I affirm that any information obtained from the records requested from the Montgomery County Board of Elections will not be used for commercial or other purposes, except for those related to elections, political activities and law enforcement as required by 25 Pa.C.S. §§ 1207(b) & 1404(c)(2). I further affirm that I will not publish any of the above lists on the Internet as such publication is prohibited by 4 Pa. Code §§ 183.13 (g) & 183.14 (k).

I verify that this statement is true and correct. I understand that false statements made are subject to the penalties of 18 Pa.C.S. 4904 relating to unsworn falsification to authorities.

Requestor's Signature Date

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Monday, February 14, 2022 12:53 PM
To: hhoney@haystackinvestigations.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:	Heather Honey
Company:	
Address 1:	1451 Quentin Road
Address 2:	Suite 400-199
City:	Lebanon
State:	Pennsylvania
Zip:	17042
Phone:	717-288-7171
Email:	hhoney@haystackinvestigations.com
Agency (list):	Montgomery County
Agency Address 1:	Office of the Solicitor
Agency Address 2:	PO Box 311
Agency City:	Norristown
Agency State:	Pennsylvania
Agency Zip:	19404
Agency Phone:	610-278-3033
Agency Email:	openrcrd@montcopa.org

Records at Issue in this Appeal:	Drop Box Chain of Custody Records, Chain of Custody Records for distribution of Election Materials, County Procedures and Guidelines for Drop Box Retrieval, Records of the Dates of Operation of Drop Boxes and Satellite Voting Locations (not necessarily the same as the scheduled dates of operation - the request was for a record of the actual dates of operation)
Request Submitted to Agency Via:	web form
Request Date:	12/15/2021
Response Date:	01/24/2022
Deemed Denied:	No
Agency Open Records Officer:	Joshua Stein
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:	Yes
Attachments:	<ul style="list-style-type: none"> • HH Original Request RTK Montgomery.pdf • OR21-816 (Honey) 30 day letter.pdf • OR21-816 (Honey) Response Letter.pdf • BoE Request for Public Lists.pdf • Montgomery Chain of Custody Appeal Letter .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.

Liz Wagenseller
Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101

Dear Ms. Wagenseller,

On December 15, 2021, I submitted a RTK request to Montgomery County Voter Services for digital copies of several public records from the 2020 General Election including, electronic copies of chain of custody documents related to the retrieval of ballots from drop boxes and satellite voting location, the actual dates of operation of the drop boxes and satellite voting locations (not the posted list but the actual dates of operation), a copy of the procedures used by the County for retrieval of ballots and instructions provided to the ballot retrievers, and chain of custody records regarding materials distributed to voting locations.

The drop box chain of custody documents were denied because the County claims that *"access to these records is provided under another statute other than the RTKL. The information requested is exempt from disclosure pursuant to Pennsylvania's Election Code, 25 P.S. § 2648."* The Election Code does not include Chain of Custody documents. The County erred in their denial. Access to the records I requested is provided under another statute other than the RTKL – but that statute is **25 P.S. §1307-D** which says "All official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear and all information and lists are designated and declared to be public records." The ballots and the envelopes and **all information and lists are declared to be public records**. There are no limitations on the disclosure of these public records (except the RTKL) and no ambiguity in the law. Clearly, 25 P.S. §1307-D applies to this request and therefore the County should provide the electronic copies of these public records as requested.

Regarding the denial of my request for chain of custody documents related to election materials distributed to voting locations in which the County claims "access to these records is provided under another statute other than the RTKL. The information requested is exempt from disclosure pursuant to Pennsylvania's Election Code, 25 P.S. § 2648." 25 P.S. § 2648 does not provide for access to chain of custody documents related to the distribution of election materials. It is certainly in the public interest to view the records to show how the County managed chain of custody of important election related materials. Further, my RTK request did not seek to inspect any original documents that would require a visit to the County office during normal business hours. My request was only for electronic copies of records. Even the Election Code clearly says that all records shall be public with the narrow exception of contents of the ballot box and records of voters who required assistance.

PA law makes it clear that public access to election related records are not limited to in-person physical inspection of original documents and artifacts that must be done during

normal business hours. In the early 1900s, technology did not exist to make electronic copies of district registers, petitions, affidavits, etc. In 2022, technology allows review of records in electronic form and those records can be sent via email. The law makes it clear that the legislative intent was to make these important records public. For example, the legislature made voter records, including name, address, date of birth and voter history of every person registered to vote in the Commonwealth available to any person anywhere. Prior to the implementation of the SURE System, these records would have only been accessible for in-person inspection of the physical cards that used to be the district register. Now, 25 Pa.C.S. Section 1404 makes SURE records and voter history records available electronically to anyone in any state regardless of registration status and regardless of place of residence. These are clearly election related records. My request does not include records of voters or their voter history, but this reference is to demonstrate that not all election records require in person inspection and that access to election records are not limited to qualified electors in the county in question.

Review of records on the OOR website show that in many recent cases, election related records were granted to requestors who were not qualified electors of the county from which the records were requested. Three such examples are referenced below.

- a. Docket No: AP 2021-2134 — Allegheny County election related records were granted to a Butler County resident.
- b. Docket No.: AP 2021-1661 — Fulton County election related records were granted to an Allegheny County resident.
- c. Docket No: AP 2021-0160 — Philadelphia election related records were granted to a resident of Virginia.

These decisions (and many others) reflect the obvious distinction between inspection of original artifacts which would need to be inspected under the supervision of the county and electronic copies of records which require no such supervision.

65 P.S. § 67.708 (a)(1) states:" 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." The County has provided no evidence that chain of custody records are exempt from public access.

65 P.S. §67.3101.1 says: "If 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." In this case, there is no conflict between the Right to Know law and any other state law. There are no prohibitions regarding access to chain of custody records.

The Right to Know law defines a record as "Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained

electronically and a data processed or image-processed document." Chain of custody documents are clearly a record.

The Right to Know law defines a requestor as "A person that is a legal resident of the United States and requests a record pursuant to this act." I am clearly a legal requestor. Because there are no conflicting laws regarding access to chain of custody records, the RTK law should apply, and the records should be provided as requested.

My request for records of the drop box locations and satellite voting locations was not for the website post of available locations and scheduled times but it was for the dates and times the locations were actually opened and in use during the 2020 General Election. My request was not for the schedule. While the County directed me to a website of the schedule, that was not the record I requested.

The County denied my request for procedures and training materials used to train people in the requirements for secure ballot retrieval from drop boxes and satellite voting locations because they claim that disclosure of records "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." The County stated that all retrieval is done by law enforcement and that disclosing the procedures used would cause a risk of physical harm. My request was for the public records regarding the procedures used for secure ballot retrieval from an election held in November 2020. There is no risk to any person in disclosing what procedures, guidelines and documents were used to record the retrieval activities. The public certainly has the right to know how what, if any, steps the County took to maintain proper chain of custody of ballot and election materials. The burden of proving that a record is exempt from public access is on the County by a preponderance of the evidence. The County provided no evidence that disclosure would or even could cause any harm to anyone.

I respectfully request that the OOR review this information and order Montgomery County to provide the public records requested.

Thank you,

Heather Honey

	:	PA Office of Open Records
HEATHER HONEY	:	Docket No. AP 2022-0453
vs.	:	
COUNTY OF MONTGOMERY	:	

AFFIDAVIT OF JOSHUA STEIN
SOLICITOR OF MONTGOMERY COUNTY

I, Joshua Stein, being duly sworn, hereby depose and say that the statements made below are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

1. I am the Solicitor for the County of Montgomery.

2. I am aware of the Right-to-Know request submitted to Montgomery County by Heather Honey (The Requestor) on December 15, 2021.

3. The December 15, 2021, request sought the following:

“I am requesting 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.
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.

Thank you,
Heather Honey”

4. On December 23, 2021, the County requested a 30-day extension of time in which to respond to the Request.

5. On January 24, 2022, the County of Montgomery granted Nos. 3 and 4¹ of the Request, as the records were public records available online on the County’s website, and the County denied Nos. 1 through 2 and denied Nos. 5 through 7 of the Request as access to these records are controlled by Pennsylvania’s Election Code, 25 P.S. § 2648. The County denied Request No. 8 under Sections 708(b)(1)(ii) and 65 P.S. § 67.708(b)(2) of the RTKL, and provided The Requestor with the Voter Services Public Information Request form to request records under the public access provisions of Pennsylvania’s Election Code.

6. At issue in the instant appeal is whether the County erred in its denial of access pursuant to Pennsylvania’s Election Code, 25 P.S. § 2648, and the denial of access to Request No. 8 under Sections 708(b)(1)(ii) and 65 P.S. § 67.708(b)(2) of the RTKL.

7. The RTKL is clear that “If the provisions of the [RTKL] conflict with any other federal or state law, the provisions of the [RTKL] shall not apply.” *See* 65 P.S. §67.3101.1.

8. The Requestor concedes in her appeal to the OOR that access is governed by another statute other than the RTKL. *See* Heather Honey Appeal Letter, page 1 (2022).

9. Title 25, along with all of its corresponding Sections, is otherwise referred to as Pennsylvania’s Election Code. The Code contains specific requirements for public access to

¹ The Requestor alleges that requests 3 and 4 were not met because the request “was not for the website post of available locations and scheduled times but it was for the dates and time the locations were actually opened and in use.” *See* Heather Honey Appeal Letter page 3 (2022). The dates posted on the county website are the same as the dates and times the locations were actually open. Therefore, requests 3 and 4 were met by the county.

records related to ballots and the contents of drop boxes as well as other records of County Election Boards; thus, the provisions of the [RTKL] shall not apply, as the requirements of Pennsylvania's Election Code supersede the RTKL's access provisions. *See* 65 P.S. §67.3101.1.

10. Nos. 1 through 2, and Nos. 5 through 7 of The Requestor's Request relate to matters clearly under the purview of the Pennsylvania Election Code; therefore, the Pennsylvania Election Code controls the procedure in which to access the requested 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 RTKL. *See, Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). *See*, 25 P.S. § 2648. *See also, Bennett v. Lycoming Cty.*, OOR Dkt. AP 2021-2616, 2021 PA O.O.R.D. LEXIS 2680 (the RTKL does not apply since access to the records is governed by the Election Code, 25 Pa.C.S. § 2648).

11. The Requestor incorrectly asserts that 25 P.S. §1307(D) applies to access. The Requestor cites language contained within 25 P.S. §3150.17 which states that "[a]ll official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear and all information and lists are designated and declared to be public records." 25 P.S. §3150.17(a). The Requestor contends that the requested records fall under the umbrella of all information and lists describe in section 3150.17. This is an incorrect assumption. The section specifically lists the mail-in balloting materials that are subject to this section. All lists and records for the purpose of the section are those that relate directly to the documents specifically listed earlier in the section and not to more generalized records of the Board of Elections relating to office procedures and chain of custody.

12. Section 2648 of the Pennsylvania Election Code, states:

“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.”

Act 3 of 2002, at 25 Pa.C.S. §2648. (Emphasis added).

13. The Requestor, upon information and belief and based on the information provided in her RTK request and subsequent appeal to the OOR, is not a qualified elector of Montgomery County.

14. The Requestor contends that the provisions of section 2648 requiring county residency are no longer applicable, stating that

“In the early 1900s, technology did not exist to make electronic copies of district registers, petitions, affidavits, etc. In 2022, technology allows review of records in electronic form and those records can be sent via email. The law makes it clear that the legislative intent was to make these important records public. For example, the legislature made voter records, including name, address, date of birth and voter history of every person registered to vote in the Commonwealth available to any person anywhere. Prior to the implementation of the SURE System, these records would have only been accessible for in-person inspection of the physical cards that used to be the district register. Now, 25 Pa.C.S. Section 1404 makes SURE records and voter history records available electronically to anyone in any state regardless of registration status and regardless of place of residence. These are clearly election related records. My request does not include records of voters or their voter history, but this reference is to demonstrate that not all election records require in person inspection and that access to election records are not limited to qualified electors in the county in question.”

See Heather Honey Appeal Letter, page 2 (2022).

15. The Requestor’s arguments regarding the existence of modern technology that would make residency requirements for records inspection unnecessary are of no moment. The intent of section 2648 and section 1404 is that records are only to be made available to qualified

electors who are able to establish residency within the required boundaries. While The Requestor claims that 25 Pa. C.S. §1404 makes records available to “anyone in any state”, that is an incorrect reading of the statute. 25 Pa. C.S. §1404(c) very clearly limits access to copies of the list in paper or in “some other form” to “any registered elector in this Commonwealth.” This is a statute that was enacted in 2002 which is well within the modern technological times that The Requestor contends do not necessitate residency requirements. The inclusion of a residency requirement would indicate that there is no connection to the ease of accessibility in these restrictions, but that the Legislature intended that this information be available to a specifically defined group of people. With the implementation of Act 77 in 2019, the Legislature made broad sweeping changes to the Election Code. As a part of that legislation the General Assembly could have made amendments removing residency requirements for access to certain documents. Indeed, The General Assembly could choose to take that action at any time. The fact that they have refrained from doing so indicates that it is a necessary provision that must be adhered to.

16. In her appeal to the OOR, The Requestor contends that “in many recent cases, election related records were granted to requestors who were not qualified electors of the County from which the records were requested” and cites three (3) Final Determinations from the OOR. None of these cases are applicable to facts in this appeal. See Heather Honey Appeal Letter page 2. (2022).

17. In *Dillon, McCandless, King, Coultier & Graham, LLP v. Allegheny County*, OOR Dkt. AP-2021-2134, Allegheny County was required to conduct a good faith search and provide records relating to “contracts.” The Requestor’s Request does not seek Contracts, which would be subject to public access under the RTKL.

18. In *Walczak v. Fulton County*, OOR Dkt. AP-2021-1661, (2021), The Requestor submitted a Request for “seeking all records relating to post-election audits or the funding thereof.”

The Requestor's Request of Montgomery County does not seek "all records relating to post-election audits or the funding thereof." The financial records would be subject to public access under the RTKL, but The Requestor's request does not seek these records.

19. In *Jason Snead and Honest Elections Project v. City of Philadelphia, Office of the City Commissioners*, OOR Dkt No. AP-2021-0160, the Records sought were e-mails and other "electronic communications between the Office and officials or employees of the Pennsylvania Secretary of the Commonwealth related to ballot cures." The OOR also held in *Snead* that, "following a good faith search for records, the Office must provide The Requestor with access to any responsive records in accordance with the access provisions of the Election Code."² Miss Honey's Request at issue in the instant appeal, does not see electronic communications related to ballot cures.

20. The OOR has found in previous cases that the Pennsylvania's Election Code supersedes the provisions of the RTKL. See *Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing § 2648 of the Election Code and noting that it "creates a separate process for obtaining these records and conditions the public inspection and copying: 1) to qualified electors of the county, 2) during ordinary business hours, and 3) when the records are not being used by the elections board"); *Bloch v. Adams Cnty.*, OOR Dkt. AP 2018-2227, 2019 PA O.O.R.D. LEXIS 95; *Kathleen Gallagher and the Republican National Committee v. Montgomery County*, OOR Dkt. AP-2021-2945, (2021).

21. Finally, the County has raised RTKL exemptions 65 P.S. § 67.708(b)(1)(ii) and 65 P.S. § 67.708(b)(2) to Request No. 8 for "copies of all procedures and training materials used to train people in the requirements for secure ballot retrieval from drop boxes and satellite voting

² While the finding of the OOR was correct in the determination that the provisions of the Pennsylvania Election Code applied to the production of these documents, it is the belief of Montgomery County that the OOR went too far in making any determination or issuing any directions ordering of the Office of the City Commissioners to produce documents outside the purview of the Right To Know Law.

locations.” The County contends, that while typically procedures and training materials would be subject to access under the RTKL, in the instant case, the 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 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. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). “Reasonably likely” has been interpreted as the likelihood that disclosure would cause the alleged harm “requiring more than speculation.” *Carey*, 61 A.3d at 375; Governor’s Office of *Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011); *Lutz v. City of Phila.*, 6 A.3d 669 (Pa. Commw. Ct. 2010).

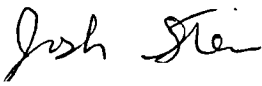
22. The secure ballot procedures and training materials are used to train Montgomery County Sheriffs, who are members of law enforcement.

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.

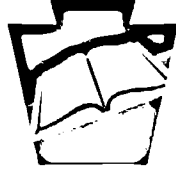
25. The release of the secure ballot procedures and training materials would give individuals advance notice of the times and locations where law enforcement will be present to collect live ballots, which could equip individuals to counteract and present a dangerous risk of harm to the Sheriffs responsible for ballot retrieval and/or compromise the ballots themselves.

26. For all of the above-stated reasons, Montgomery County believes this appeal should be denied.

By:  _____

Joshua M. Stein
County Solicitor
Montgomery County Solicitor's Office
One Montgomery Plaza Suite 800
Norristown, PA 19404-0311
Phone: 610-278-3033
Fax: 610-278-3069
openrcrd@montcopa.org

Dated: March 7, 2022



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

HEATHER HONEY,
Requester

v.

MONTGOMERY COUNTY,
Respondent

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Docket No: AP 2022-0453

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.

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).

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).

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

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 employees have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employee 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).

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.

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).

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

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 Env’tl. 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

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).