



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**MIKE MILLER,  
Requester**

**v.**

**LANCASTER COUNTY,  
Respondent**

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**Docket No: AP 2022-1749**

### **INTRODUCTION**

Mike Miller (“Requester”) submitted a request (“Request”) to Lancaster County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking to inspect original mail-in ballots and envelopes received by the County for the 2022 primary election. The County partially denied the Request, arguing that certain ballot envelopes and the mail-in ballots are confidential pursuant to the Election Code. 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 any further action, as directed.

### **FACTUAL BACKGROUND**

On June 8, 2022, the Request was filed, seeking inspection of “all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election. The mail-in ballots and envelopes are explicitly declared to be public records and shall be open for

inspection. Specifically, 25 P.S. § 1307-D states, in relevant part: ‘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’.**’ (Emphasis in original).

Following a thirty-day extension of time to respond to the Request, 65 P.S. § 67.901, the County partially denied the Request, by granting “partial in person inspection of the mail-in ballot envelopes, not including declarant signatures or information related to military electors” provided that the Requester can establish that he is a qualified elector under Section 2648 of the Election Code (“Code”), 25 P.S. § 2648. The County denied access to the declarant signatures pursuant to Sections 1401 and 1404 of the Election Code<sup>1</sup> and 4 Pa. Code § 183.14(c)(1). The County denied access to ballot envelopes and the mail-in ballots for military electors pursuant to Section 3146.8 of the Code.<sup>2</sup> Finally, the County denied access to the requested mail-in ballots asserting that Section 2648 of the Code makes the contents of a ballot box confidential. 25 P.S. § 2648.

On July 27, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>3</sup> The Requester argues that he is a qualified elector and is entitled to inspect all of the mail-in ballots and envelopes, including the signatures, pursuant to 25 P.S. §§ 2648. The Requester asserts that the requested records are designated as public records under 25 P.S. 3150.17. The Requester argues that Section 3101.1 of the RCTL prohibits the RCTL from undermining

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<sup>1</sup> While the County references sections 1401 and 1404 of the Election Code, such provisions were repealed by 1937, June 3, P.L. 1333, §1901. See <https://advance.lexis.com/document/?pdmfid=1000516&crd=e25a0e50-96f1-4827-ac75-f9d1eb5e65a3&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5DPM-DNC1-DYB7-T2R4-00000-00&pdtnodeidentifier=AABAAUAAHAAD&ecomp=yw2ck&prid=b5d4352d-cd3b-438b-a986-29487f578c88> (last accessed September 28, 2022). It appears that the County was attempting to reference Sections 1401 and 1404 of the Voter Registration Act, 25 Pa.C.S. §§ 1401 and 1404.

<sup>2</sup> In the County’s final response, it referenced 25 P.S. § 25305(A)(3) in support of the denial of access to the mail-ballot envelopes of military electors. However, research shows that no such statutory provision exists and the language quoted by the County is found in 25 P.S. § 3146.8.

<sup>3</sup> In the appeal, the Requester granted the OOR additional time to issue the Final Determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”)

another state law. The Requester further argues that 4 Pa. Code § 183.14, and Sections 1401 and 1404 of the Code apply to voter registration lists, not mail-in ballots or envelopes. The Requester further asserts that the County must provide evidence that certain mail-in ballots and envelopes are related to military electors. 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. 65 P.S. § 67.1101(c).

On August 15, 2022, the Requester submitted a supplemental statement in support of the appeal, asserting that *Stroehmann v. Lycoming Cnty.*, OOR Dkt. AP 2022-0885, 2022 PA O.O.R.D. LEXIS 1292, applies to this matter, asserting that in the Final Determination, the “OOR affirmed that mail-in ballots are lawfully public records.”

On August 17, 2022, the County submitted a statement reiterating its grounds for denial. The submission included a copy of an August 8, 2022 email from the Pennsylvania Department of State to county election officials providing guidance on RTKL requests for Cast Vote Record (CVR) files used in the 2020 general election.

Also, on August 17, 2022, the Requester submitted a reply to the County’s submission, arguing that the County has only repeated its final response, that the County continues to misapply the Election Code and further asserting that an affidavit was not presented in support of the County’s submission.

### **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 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)).

The Requester argues that the statutes and regulations cited by the County do not apply to prevent the inspection of the requested mail-in ballots and envelopes, including signatures. The Requester asserts that Section 3150.17 of the Election Code designates the requested records as public records. 25 P.S. § 3150.7. The Requester further argues that Section 3101.1 of the RTKL “applies and my request for these documents is NOT subject to the [RTKL] or the PA Office of Open Records.” *See* 65 P.S. § 67.3101.1 (emphasis in original).

The County argues that 25 Pa.C.S. § 1401<sup>4</sup> and 4 Pa. Code § 184.14(c) “expressly prohibit[] the disclosure of ... ‘the signature of a registrant or applicant’” and that the mail-in ballot envelope cannot be adequately redacted to secure the signature, while also maintaining the integrity of the envelope. The County further argues that the Voter Registration Act and its implementing regulations “comprehensive[ly] govern the accessibility of voter registration information” and the RTKL does not apply to determine whether such records may be publicly accessed. The County relies on *Pennsylvania for Union Reform v. Pa. Dep't of State*, 138 A.3d 727 (Pa. Commw. Ct. 2016) (“*PFUR*”), in support of its argument. Finally, the County argues that ballots are not subject to public disclosure based on the Pennsylvania Constitution, Art. VII, Sec. 4, which provides, “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, that secrecy in voted be preserved.”

Both parties correctly argue that the RTKL does not apply to determine whether the requested records are publicly accessible. The Requester relies on *Stroehmann* to support his argument that the ballots and envelopes may be inspected. However, in *Stroehmann*, the OOR

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<sup>4</sup> The County again references the Election Code for this citation. However, both 25 Pa.C.S. § 1401 and 4 Pa. Code § 183.14(c)(1) are provisions related to the Pennsylvania Voter Registration Act. *See* 25 Pa.C.S. §§ 1101, *et seq.*

applied and synthesized Sections 2648 and 3150.17(a) of the Election Code to a request for mail-in ballot images from the 2020 general election” and determined that whether the records are publicly accessible may not be determined under the RTKL.

There is a distinction between whether a record is public in nature and publicly accessible.

Section 2648 of the 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...

25 P.S. § 2648 (emphasis added). Section 3150.17 of the Code further provides, as follows:

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

(b) Record. For each election, the county board shall maintain a record of the following information, if applicable, for each elector who makes application for a mail-in ballot:

- (1) The elector’s name and voter registration address.
- (2) The date on which the elector’s application is received by the county board.
- (3) The date on which the elector’s application is approved or rejected by the county board.
- (4) The date on which the county board mails or delivers the mail-in ballot to the elector.
- (5) The date on which the elector’s completed mail-in ballot is received by the county board.

(c) Compilation. The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within 48 hours of the request.

25 P.S. § 3150.17 (emphasis added).

The parties conflate the issues of whether the records sought are *public records* under the RTKL and whether the records may be *accessed* under the RTKL. Under the RTKL, Section 67.302(a) provides that “[a] local agency or local agency shall provide public records in accordance with this act.” 65 P.S. § 67.302(a). Records in the possession of a local agency are presumed to be public records. However, this “presumption shall not apply if: (1) the record is exempt under section 67.708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree.” Further, Section 306 of the RTKL, entitled “Nature of document,” states: “Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. §67.306. However, as pointed out by the Requester Section 3101.1, makes clear that, “[i]f the provisions of this act regarding *access* to records conflict with any other Federal or State law, the provisions of this act shall not apply.” (Emphasis added).

Here, we are not examining the public nature of the records requested, the mail-in ballots and ballot envelopes, including the signatures on the ballot envelopes. Section 3150.17(a) of the Code does not exclude the voter’s signature on the declaration envelope from public access but instead maintains that “[a]ll official ... ballots, ... and envelopes on which the executed declarations appear ... are hereby designated and declared to be public records.” Thus, the declaration envelopes are explicitly made public under the Election Code. *See Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823 (Pa. Commw. Ct. 2014) (explaining that “a statute should be clear when it establishes the public nature of the records” by stating the records “‘shall be public,’ or the like”); *see also Towne v. Allegheny Cnty.*, OOR Dkt. AP 2021-2542R, 2022 PA O.O.R.D. LEXIS \_\_\_\_ (holding that because the Election Code makes the declaration envelopes public, a

requester may view the envelopes pursuant to the Code's access provisions). Rather, we are determining whether the requested records may be *accessed* under the RTKL, which, notably, both parties argue that the RTKL does not apply.

When examining matters where there is a conflict between the Election Code and the RTKL, the OOR has found that, while the Election Code makes many records in the custody of the Election Board subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. *See Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing that section of the Election Code and noting that it “creates a separate process for obtaining these records and conditions public inspection and copying: 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”); *see also Bloch v. Adams Cnty.*, OOR Dkt. AP 2018-2227, 2019 PA O.O.R.D. LEXIS 95.<sup>5</sup> While the *Stroehmann* decision does apply to the instant matter, the holding in *Stroehmann* is more detailed than portrayed by the Requester. In *Stroehmann*, the OOR applied the Election Code statutory language, along with OOR precedent and court holdings, to more specifically determine that the requested mail-in ballots “are public under the Election Code..., [but], the governance of inspection and copying under the Election Code are beyond the OOR's purview.” *Stroehmann*, 2022 PA O.O.R.D. LEXIS 1292, \*8-10 (citing *Heltzel*, 90 A.3d at 831-33); *see also Gallagher and the Republican National Committee v. Montgomery Cnty.*, OOR Dkt. AP 2021-2945, 2022 PA O.O.R.D. LEXIS 622; *Hall v. Butler Cnty.*, OOR Dkt. AP 2022-0508, 2022 PA O.O.R.D. LEXIS 1062; *Shepherd v. Phila. Office of City Commissioners*, OOR Dkt. AP 2021-2929, 2022 PA O.O.R.D. LEXIS 694.

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<sup>5</sup> In addition, because the records are not unconditionally public under the Election Code, the OOR would be required to examine any exemptions from disclosure under the RTKL asserted by an agency when records of a County Elections Board are sought by a RTKL request. *See Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014). However, here, the County has not asserted any RTKL exemptions.

The County relies on *PFUR* and the language of the Voter Registration Act to assert that the RTKL does not apply to determine the public access of the requested records and, further, that access to the signatures on the mail-in ballot envelopes is prohibited. Pennsylvania courts and the OOR have consistently held that voter registration information is governed by Voter Registration Act, 25 Pa.C.S §§ 67.1101-1906, and associated regulations. In *PFUR*, the Commonwealth Court held that the Act “comprehensively governs” the accessibility of voter registration information, and the RTKL does not apply since access to the records was otherwise provided by law. 138 A.3d 727, 732-33. More specifically, the Court found:

Section 1404 of the Voter Registration Act, 25 Pa. C.S. § 1404, *governs public information lists, generally*. That section establishes the information contained in public information lists, the authority of the Secretary to promulgate regulations pertaining to access to the list, as well as information about copying the list. 25 Pa. C.S. § 1404(a)-(c). Section 183.14 of the Department's Regulations, 4 Pa. Code § 183.14, also governs public information lists. That section includes more specific information about the list's contents, availability, inspection and copying, fees, and provides a timeline for processing requests, as well as certain reasonable safeguards, which must be followed before access to the list will be granted. 4 Pa. Code § 183.14(a)-(b) (establishing the information contained in the list, the time the list is available, and the contents of the Department's form), (h) (providing that access to the list may be disrupted occasionally), (i) (prescribing a timeline for processing requests and that “the Department . . . will distribute the public information list . . . for a reasonable fee”), (j) (permitting the Department to “supply the . . . list in a paper copy or in an electronic format”), and (k) (providing that “[t]he list may not be published on the Internet”).

In the Voter Registration Act, the General Assembly established a comprehensive framework within which the Department is responsible *for compiling, organizing, maintaining, and disseminating voter registration records*. 25 Pa. C.S. § 1404; 4 Pa. Code § 183.14.

*PFUR*, 138 A.3d at 732-33 (emphasis added). However, the County's reliance on *PFUR* and the Voter Registration Act is misplaced because, voter registration information or records are not at issue in this appeal. *See* 25 Pa.C.S § 1101 (Scope – “This part deals with voter registration.”), In this matter, the records at issue are mail-in ballots and their envelopes and, therefore, as set forth

above, access to such records is governed by the procedures provided in the Election Code. Whether the Requester chooses to avail himself to the procedures of the Election Code in an effort to demonstrate that his is a qualified elector of Lancaster County is beyond the purview of the RTKL. *See* 65 P.S. § 67.305(a)(3); 65 P.S. § 67.3101.1; *Gallagher and the Republican National Committee v. Montgomery Cnty.*, OOR Dkt. AP 2021-2945, 2022 PA O.O.R.D. LEXIS 622, (the RTKL does not apply since access to the records is governed by the Election Code, 25 Pa.C.S. § 2648); *Bennett v. Lycoming Cnty.*, OOR Dkt. AP 2021-2616, 2021 PA O.O.R.D. LEXIS 2680 (same); *but cf. Giancola and the Republican National Committee v. Allegheny Cnty.*, OOR Dkt. AP 2022-1177, 2022 PA O.O.R.D. LEXIS 1602 (finding that because the requester presented evidence that he is a qualified elector in the county, the requested records were accessible subject to the parameters of the Election Code).

Finally, the Requester argues that the County should be required to provide evidence that the mail-in ballots and envelopes of military electors may not be made public “as per 25 P.S. §3150.17.” The express language of Section 3150.17 authorizes this exception and, therefore, evidence is not necessary to prove that it is a legal exception to the statutory declaration of the public nature of mail-in ballots, ballot envelopes and other related documents. *See* 25 P.S. §3150.17 (“... except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the Department of Defense because of military security.”)

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to grant access to the requested records, including the ballot envelope signatures, subject to the provisions of the Election Code, within thirty days. This Final

Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Lancaster 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. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>6</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 5, 2022**

*/s/ Kelly C. Isenberg*

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SENIOR APPEALS OFFICER  
KELLY C. ISENBERG ESQ.

Sent to: Mike Miller (via email only);  
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<sup>6</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).