

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION**

MICHAEL MILLER

v.

No. CI-22-08146

COUNTY OF LANCASTER

OPINION

BY: ASHWORTH, P.J., MAY 12, 2023

Petitioner, Michael Miller, is seeking to enforce a Final Determination of the Pennsylvania Office of Open Records ("OOR") relative to records deemed public at OOR Docket No. 2022-1749. Respondent, County of Lancaster, filed Preliminary Objections, the parties have finished briefing, and the matter is now ripe for disposition. For the reasons set forth below, the second and third preliminary objections are sustained, and the complaint is dismissed with prejudice.

I. FACTUAL BACKGROUND

On June 8, 2022, Petitioner submitted a Right-to-Know-Law ("RTKL") request seeking inspection of "all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election." Following Respondent's denial of Petitioner's request, Petitioner appealed the denial to the OOR. On October 5, 2022, the OOR issued a Final Determination granting in part and denying in part the request, allowing Petitioner access to the requested documents, except for mail-in ballots and envelopes of military electors. The OOR further held that the County is required to grant access to the requested records within thirty days and "subject to the provisions of the

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Election Code[.]" OOR Final Determination. Neither Petitioner nor Respondent appealed the Final Determination.

Upon receipt of the OOR's Final Determination, Respondent sent Petitioner a letter via email citing 25 P.S. § 2648 and stating that inspection of the records "shall be subject to proper regulation for safekeeping of the Pennsylvania Election Code[.]"

According to the letter, Petitioner was required to comply with the following conditions:

1. One person shall inspect at a time. No groups.
2. A person inspecting shall sign a sheet provided by the County upon each visit noting the time of arrival and the time of departure.
3. Requests to inspect shall be scheduled in advance by contacting Christa Miller, Chief Registrar by email at mchrista@co.lancaster.pa.us; Appointments of up to 2-hour duration will be scheduled at times when Voter Services staff can be present to monitor the inspection process, in accordance with 25 P.S. 2648 of the Election Code which states that public inspection of records shall only occur in the presence of a member or authorized employee of the board of elections.
4. A person inspecting shall inspect only 1 batch of records at a time, in order to preserve their organizational integrity.
5. No writing implements shall be permitted near the records. Records must be inspected on one side of the room, and notes must be taken on the opposite side of the room.
6. No photography or video shall be permitted.
7. The County reserves the right to have a Sheriff's deputy or its designee present.

(Jacquelyn Pfursich 10/5/22 letter).

On December 29, 2022, Petitioner filed a "Verified Petition to Enforce an order by the [OOR]" demanding, among other things,¹ that Respondent "shall place no greater

¹ The following is a complete list of Petitioner's demands:

1. Provide declaratory judgment with respect to the rights of the parties to this action.
2. [Respondent] shall avail all the records to [Petitioner] for inspection and copying.
3. [Respondent] shall avail its high-speed scanner for the purpose of making digital copies for [Petitioner], in Petitioner's presence.
4. [Respondent] shall comply with this Honorable Courts order specifying the conditions of the inspection.
5. The order shall place no greater demands on [Petitioner] than those named in the determination.

demands on [Petitioner] than those named in the determination." (Petition, at 7). On January 23, 2023, Respondent filed Preliminary Objections and a supporting brief, which was followed by responsive briefs by both parties.

II. SUMMARY OF ARGUMENTS

Respondent makes the following preliminary objections pursuant to Pa.R.C.P. 1028. Petitioner has replied to each of Respondent's objections, and the parties' positions are summarized below.

In its first preliminary objection, Respondent argues that "[n]o statute or rule of court permits the filing of a 'petition to enforce' an OOR determination." (Preliminary Objections ("P.O.s") at ,r22). Respondent objects to Petitioner's pleading pursuant to Pa. R.C.P. 1028(a)(8), on the basis that there exists "a full, complete and adequate non-statutory remedy at law." *Id.* at ,r23. In this case, Respondent asserts that the appropriate legal remedy is an action in mandamus. *Id.* at ,l24.

In his response, Petitioner suggests that an action in mandamus is not appropriate and seeks guidance from the Court "to identify causes of action to plead for enforcement of the OOR determination as well as additional remedies named in his praecipe[.]" (Petitioner's Response, at ,rs).

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6. (Respondent) shall not fail to schedule the date(s) and time(s) for [Petitioners] inspection with this Honorable Court within ten (10) days.
 7. (Respondent) shall not make a defamatory public statement, written or oral, about [Petitioner] regarding this matter.
 8. All men, women, and persons are enjoined from handling the requested documents apart from an order of this Honorable Court.
 9. [Respondent] shall pay [Petitioner's] reasonable costs of litigation or an appropriate portion thereof.
 10. [Respondent] shall pay a civil penalty of \$500 for each day it fails to comply with this Honorable Court's Order
 11. Such other and further relief as the circumstances and demands of justice may warrant.

In its second preliminary objection, Respondent argues that Petitioner is not entitled to any of the requested relief.-specifically, Petitioner's requests that Respondent allow Petitioner to use its "high-speed scanner for the purpose of making digital copies," that Respondent "not make a defamatory public statement ... about Petitioner[.]" and that "[a]ll men, women, and persons [be] enjoined from handling the requested documents[.]" (P.O.s at 1J32). Respondent states that these requests "fall[] well outside the bounds of any reasonable interpretation of the OOR Determination or the *Election Code*[.]" and requests this court to strike paragraphs 3, 7, 8, and 9 from Petitioner's demands. *Id.* at 1J33.

In response to this second objection, Petitioner simply states that Respondent has "fail[ed] to establish that the Petitioner's remedies meet the definitions of being scandalous and impertinent " (Petitioner's Response, at 1f10).

In its third preliminary objection, Respondent argues the alternative to its first objection in anticipation of this Court choosing to treat the Petition as an action in mandamus. (P.O.s at 1J36). According to Respondent, an action in mandamus is legally insufficient because the County complied with the OOR determination in that the OOR determination provides that the County must grant access to Petitioner "subject to the provisions of the Election Code[.]" *Id.* at.,139. Respondent cites to the Election Code and emphasizes that inspection of public records "shall be subject to proper regulation for safekeeping of the records and documents." *Id.* at 1J41 (citing 25 P.S. § 2648).

Respondent claims that "[t]he [c]onditions were established within the discretion of the County in accordance with the express language of Section 308 of the Election Code[.]" and an action in mandamus "will not lie to compel a public official to exercise discretion

in a particular manner." *Id.* at ffl44-49 (citing *Chadwick v. Dauphin Cnty. Off. of Coroner*, 905 A.2d 600, 604 (Pa. Commw. Ct. 2006)). Respondent states that "none of the facts averred by Petitioner suggest that the County exercised its discretion in a fraudulent or arbitrary manner." (P.O. Brief, at 10).

In response to the third objection, Petitioner states that 25 P.S. § 2648 does not create a "sovereign, legislative authority to create regulations to establish the conditions it wishes to impose on the petitioner and any other citizen seeking records in accordance with the [E]lection [C]ode." (Petitioner's Response, at 6). Petitioner asserts that the opposite is true, in that "the legislature has explicitly and comprehensively limited the agency's discretion regarding disclosure." *Id.* at 8.

III. STANDARD OF REVIEW

Pennsylvania Rule of Civil Procedure 1028(a) establishes the right of a party to file certain enumerated preliminary objections.² In ruling on such preliminary objections, all well-pied material allegations, and all reasonable inferences that can be drawn from them, must be accepted as true. *Donaldson v. Davidson Bros., Inc.*, 144 A.3d 93, 100 (Pa. Super. 2016) (citing *Yocca v. Pittsburgh Steelers Sports, Inc.*, 5854 A.2d 425, 436 (Pa. 2004)). However, conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations will not be considered as true. *American Express Bank*,

² In his "Responsive Brief in Support of Petitioner's Motion to Dismiss Respondent's Preliminary Objections," Petitioner argues that the Rules of Civil Procedure do not apply, and therefore, Respondent cannot challenge his petition by filing preliminary objections. In support of this argument, Petitioner cites *Knopsnider v. Derry Twp. Bd. of Sup'rs*, 725 A.2d 245, 247 (Pa. Commw. Ct. 1999). In *Knopsnider*, the Court held that "[b]ecause a [RTKL] cause of action is begun by the filing of a notice of appeal, we have previously held that the rules of civil procedure do not apply to matters under the [RTKL]." *Id.* However, *Knopsnider* specifically involved a case brought by the filing of a notice of appeal under the RTKL. In the instant case, neither party appealed from the OOR's decision; instead, this matter is before the Court in a form which the Court deems to be an action in mandamus, which is specifically included in the Rules of Civil Procedure. See Pa.R.C.P. 1095. Therefore, Respondent appropriately filed preliminary objections in this matter.

FSB v. Martin, 200 A.3d 87, 93 (Pa. Super. 2018) (citing *Wiemik v. PHH U.S. Mortgage Co.*, 736 A.2d 616, 619 (Pa. Super. 1999)).

A preliminary objection, the effect of which would deny the pleader's claim or dismiss his or her suit, will be sustained only in cases which are clear and free from doubt. *Greenberg v. McGraw*, 161 A.3d 976, 980 (Pa. Super. 2017) (quoting *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012)). If the facts as pleaded state a claim for which relief may be granted under any theory of law, then there is sufficient doubt that requires the preliminary objections in the nature of a demurrer be rejected. *Donaldson*, 144 A.3d at 100 (citing *Homziak v. GE_Capital-Warranty Corp.*, 839 A.2d 1076, 1079 (Pa. Super. 2003)).

IV. DISCUSSION

a. **First Preliminary Objection: Existence of Adequate Non-Statutory Remedy at Law**

Respondent asks this Court to dismiss the Petition with prejudice pursuant to Pa.R.C.P. 1028(a)(8) "because "no statute or rule of court permits the filing of a 'petition to enforce' an OOR determination[.]" and that "Pennsylvania courts have held that an action in mandamus is the proper vehicle through which to enforce an OOR determination." (P.O.s at ¶ 22, 24 (citing *Ledcke v. County of Lackawanna*, 28 Pa. D. & C. 5th 34 (C.P. 2013)).

In *Ledcke*, the petitioner filed a petition to enforce a final determination of the OOR after Lackawanna County failed to produce records which the OOR determined were accessible. *Ledcke*, at 4. While dismissing the action, the court stated the following:

[N]o statute or rule of court endorses the filing of a "petition to enforce" the OOR's final determination as a substitute for original process in initiating a civil action in compliance with Pa.R.C.P. 1007. If a party initiates a civil proceeding by the filing of a petition and rule to show cause, but no statute or rule expressly authorizes that use of a petition and rule as original process, the civil action is "improperly commenced" and "the common pleas court has no power to act and no jurisdiction over" the parties.

Ledcke, at 7 (citing *Flaherty v. Burke*, 515 A.2d 365., 367 (Commw. Ct. 1986)).

In *Ledcke*, the court held that the writ of mandamus is the appropriate tool to compel performance where the petitioner has "a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists." *Ledcke*, at 8 (citing *Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012)). The court reasoned that where the "OOR has issued a final determination which has not been timely appealed by the local agency under 65 P.S. § 69.1302, the requester would have a clear legal right to the records at issue and the local agency's Open Records Officer would have a concomitant statutory obligation to produce those materials." *Id.*

This Court agrees with the Court's reasoning in *Ledcke* and finds that an action in mandamus is the appropriate tool by which Petitioner should seek to enforce the OOR determination. The OOR determination established Petitioner's clear legal right to access the records and imposed a duty upon Respondent to make the records available to Petitioner. Thus, if Petitioner believes Respondent is not fulfilling its duty to make the records available, then the appropriate action would be one in mandamus since there is no other adequate remedy at law.

While Respondent's argument that the Petition is not the correct action in this case is valid, this Court will treat the Petition as an action in mandamus because it pleads the essential factual prerequisites of an action in mandamus. See *Gapinski v.*

Upper Pottsgrove Twp., 164 A.3d 601,610 (Pa. Commw. Ct. 2017); see also Pa.R.C.P. 1095 (identifying the necessary elements of a complaint for an action in mandamus). Therefore, Respondent's first preliminary objection is overruled.

b. Second Preliminary Objection: Inclusion of Scandalous and Impertinent Matter; Legal Insufficiency of a Pleading (Demurrer)

Respondent requests this court to strike paragraphs 3, 7, 8, and 9, of the Petition pursuant to Pa.R.C.P 1028(a)(2) and (a)(4) arguing that Petitioner has included impertinent matters and claiming the legal insufficiency of the pleading. Specifically, Respondent asserts that none of Petitioner's demands are supported by any legal authority which authorizes requested relief, and this Court agrees.

On one hand, Petitioner asks this Court to *prohibit* Respondent from doing anything beyond what is specifically written in the Final Determination. On the other hand, Petitioner asks this court to *mandate* Respondent to do things beyond what is written in the Final Determination. Specifically, Petitioner would like the Court to order Respondent to provide a high-speed scanner, prohibit Respondent from making any "defamatory public statement[s]," and prevent anyone else from handling the records. (Petition, at 7). Additionally, Petitioner is requesting that Respondent pay "reasonable costs of litigation or appropriate portion thereof." *Id.*

Both parties agree that an action in mandamus is not available to establish legal rights, and is only appropriate to enforce rights that have already been established. *Gapinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 609 (Pa. Commw. Ct. 2017). Consequently, an action in mandamus cannot be used in this Court to establish any right of Petitioner to use Respondent's scanner, impose a gag-order on Respondent, or prohibit anyone else from reviewing public records. Additionally, Petitioner has cited no

authority, statutory or otherwise, and this *Court* has found no authority, which permits this Court to grant the requested relief. Therefore, Respondent's second preliminary objection is sustained.

c. Third Preliminary Objection: Legal Insufficiency of Pleading

Respondent requests this court to dismiss the Petition with prejudice pursuant to Pa.C.R.P. 1028(a)(4) based on the legal insufficiency of the pleading even if the Court treats it as an action in mandamus, and this Court agrees. Pursuant to the Rules of Civil Procedure, an action in mandamus must include the following in the complaint:

- (1) the name and description of the plaintiff and defendant;
- (2) the facts upon which plaintiff relies for the relief sought;
- (3) the act or duty the defendant is required to perform and the refusal to perform it;
- (4) the interest of the plaintiff in the result;
- (5) the damages, if any;
- (6) the want of any other adequate remedy at law;
- (7) a prayer for the entry of a judgment against the defendant commanding that the defendant perform the act or duty required to be performed and for damages, if any, and costs.

Pa.R.C.P. No. 1095.

Although an action in mandamus is appropriate where an individual seeks compliance with a Final Determination of the OOR, it cannot be used to direct that an agency comply with the Final Determination in a particular way where the *law* gives the agency discretion in doing so. *Chadwick v. Dauphin Cnty. Off. of Coroner*, 905 A.2d 600, 604 (Pa. Commw. Ct. 2006) ("[w]here the [public official] is clothed with discretionary powers, and has exercised those powers, mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, though in fact, the

decision may be wrong." (quoting *Anderson v. Philadelphia*, 36 A.2d 442, 444 (Pa. 1944))).³

In this case, the OOR held that Respondent was required to make the requested records available to Petitioner "subject to the provisions of the Election Code, within thirty days." (OOR Final Determination, at 10) The Election Code provides that public inspection of records "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.*" 25 P.S. § 2648 (emphasis added). The Election Code does not specify what "proper regulation for safekeeping" consists of, thereby leaving it to the agency's discretion. If the Legislature intended to mandate how records should be properly regulated for safekeeping, it would have done **SO**.

On October 5, 2022, the same day the Final Determination was issued, Respondent emailed Petitioner a letter from Jacquelyn Pfursich, Esquire, listing the conditions for viewing the records and stated the process "may require adjustments to the above rules and requirements, to the extent necessary to ensure order, and to preserve the County's records and their organizational integrity." (Jacquelyn Pfursich 1015122 letter).

Based on the foregoing, this Court finds that Respondent has complied with the OOR's Final Determination by making the records available to Petitioner subject to the

³ In his Responsive Brief, Petitioner claims that there is a remedy for the improper exercise of discretion and quoted the concurring opinion in *Chadwick* stating "[t]he arbitrary or improper exercise of an official's discretion may prevent the public official from properly performing his or her mandatory duties in accordance with the law, and an individual may utilize a writ of mandamus to challenge such action." *Chadwick v. Dauphin Cnty. Off. of Coroner*, 905 A.2d 600, 607 (Pa. Commw. Ct. 2006) (Friedman, J., concurring). However, although Respondent's conditions may be inconvenient for Petitioner, Petitioner has alleged no facts to support a finding that Respondent exercised its discretion in an arbitrary or improper matter.

regulations it deems necessary for safekeeping. The Legislature did not mandate the manner in which Respondent must do so and neither will this Court. As such, Respondent's third preliminary objection is sustained, and Petitioner's action is dismissed with prejudice.

V. CONCLUSION

For the reasons set forth below Respondent's first preliminary objection is overruled, and its second and third preliminary objections are sustained. Therefore, Petitioner's action is dismissed with prejudice.

Accordingly, I enter the following Order:

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION**

MICHAEL MILLER

v.

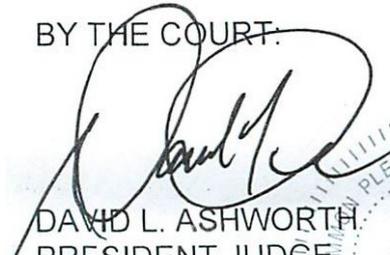
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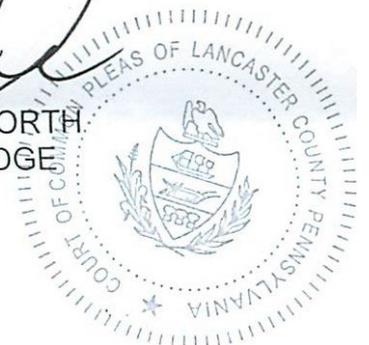
COUNTY OF LANCASTER

ORDER

AND NOW, this 12th day of May, 2023, upon consideration of the Petition to Enforce an Order by the Office of Open Records, Respondent's Preliminary Objections to the Petition, the briefs filed by the parties, and for the reasons stated in the accompanying Opinion, it is hereby ORDERED that Respondent's first preliminary objection is OVERRULED, and the second and third preliminary objections are SUSTAINED. It is further ORDERED that the Petition shall be DISMISSED with prejudice without need for a hearing.

BY THE COURT:


DAVID L. ASHWORTH
PRESIDENT JUDGE



ATTEST: NOTICE OF ENTRY
PURSUANT TO PA.
NOTIFICATION - TH
HAS BEEN FILED IF
05/12/2023

Copies to: Michael Miller, PO BOX 802, Ephrata, PA 17522
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