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February 6, 2025

VIA EMAIL

Frank Burns, State Representative
72nd Legislative District
Email: fburns@pahouse.net

Re: Voting Machine Testing Right-to-Know Request Dated December 26, 2024

Dear Representative Burns:

Your Right to Know Request dated December 26, 2024, ("the request"), seeks the following information:

["Request 1"] The number of voting machines used in Cambria County in the November 5, 2024, election;

["Request 2"] Copies of any and all policies, directives, and results tracking/tallying in effect prior to or on November 5, 2024, regarding the procedure for testing voting machines in Cambria County. This includes, but is not limited to, information on which and how many voting machines were tested, (which occurred per Commissioner Hunt's statements), what the testing procedure involved, (including the type and source of those ballots), who performed and was present for any testing, how test results and passing grades were assessed and tabulated, and the number of voting machines that may have failed such testing;

["Request 3"] Any and all documents, correspondence, (including but not limited to emails), or written explanation that determines, specifies, or illuminates "the nature of the problem" and why "the mistake was not able to be discovered until voting commenced," as attributed to Repak's statement in the Altoona Mirror;

["Request 4"] A tally of how many ballots cast in Cambria County were unable to be scanned on Election Day of November 5, 2024, and a separate tally of how many ballots were able to be scanned successfully on Election Day of November 5, 2024; and

["Request 5"] The number of blank ballots that were ordered from William Penn Printing Company on Election Day of November 5, 2024, and the number that were then successfully distributed to polling places on Election Day of November 5, 2024.

The County will first address Request 1 and Request 5 together, as both are denied for the same reason. “Under the RTKL, a request must seek records, rather than answers to questions. See *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012), (noting that the portion of a request ‘set forth as a question’ did not ‘trigger a response’); *Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; see also *Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5 (Beav. Com. Pl. Dec. 14, 2009, (‘The [RTKL does] not provide citizens the opportunity to propound interrogatories upon local agencies’). The presence or absence of a question mark is not determinative as to whether a request asks a question. See *Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.” *Meguerian v. Delaware County*, OOR Dkt. AP 2017-1951 at 6.

Here, Request 1 seeks “[t]he number of voting machines used in Cambria County in the Nov. 5, 2024 election”, and Request 5 seeks “[t]he number of blank ballots that were ordered from William Penn Printing Co. on Election Day of Nov. 5, 2024, and the number that were then successfully distributed to polling places on Election Day of Nov. 5, 2024.” A straightforward reading of Request 1 and Request 5 discloses that neither request seeks *records*; rather, both requests ask the County to answer a question. Questions within right-to-know requests are not proper right-to-know requests. See *Murphy v. Pa. Turnpike Comm’n*, 15 A.3d 1294 (Pa. Commw. 2011), (affirming OOR denial of appeal, including that questions do not trigger response under [the] RTKL). Consequently, because neither Request 1 nor Request 5 trigger a response by the County, both are denied.

Turning to Request 2, the same is denied, as the records requested do not exist.

Finally, Request 3 and Request 4 are both denied, as the records sought therein are exempt from disclosure and access. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation...[including] investigative materials, notes, correspondence and reports...and...record[s] that, if disclosed, would...[r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §67.708(b)(17)(ii); 65 P.S. §67.708(b)(17)(vi)(A). For the noncriminal investigation exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was or is being conducted regarding a noncriminal matter, *Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commw. 2010), and the inquiry, examination or official probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. “An official probe only applies to ‘noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.’” *Dep’t of Public Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. 2014), (quoting *Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920, 925 (Pa. Commw. 2012)).

It cannot be disputed that the Pennsylvania Department of State, (“the Department”), possesses the legislatively granted fact-finding powers to investigate the safety, security, and integrity of voting machines used in counties across the Commonwealth. Indeed, Section 3031.5 of Pennsylvania’s Election Code provides, in relevant part, the following: “(b) Upon the receipt of a *request* for examination or reexamination...the Secretary of the Commonwealth *shall* examine the electronic voting system and shall make and file in his office his report, attested by his signature and the seal of his office....” 25 P.S. §3031.5(b), (emphasis added).

Frank Burns, State Representative

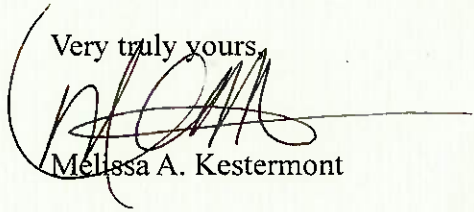
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The records requested in Request 3 and Request 4 are neither accessible nor subject to disclosure under the RTKL's noncriminal investigation exemption, as they are part of, and directly relate to, *the precise subject matter* implicated by the ongoing noncriminal investigation by the Department concerning third-party, vendor-supplied voting machines used by the County in the November 5, 2024, election. Such records, if disclosed, would improperly reveal specific information including, but not limited to, the institution, progress, data considered, *specific factual findings which must ultimately be made and determined*, and the possible result of the Department's noncriminal investigation prior to final conclusions being made regarding the same. Because both Request 3 and Request 4 seek the isolated disclosure of certain factual findings that are inextricably intertwined with the purpose of and reasons for the Department's noncriminal investigation at issue, Section 708(b)(17) of the RTKL exempts such requests. Therefore, Request 3 and Request 4 are denied.

Please be advised that this correspondence will serve to close this request with this office, as provided by law. You have the right to appeal this response, in writing, to the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234, or via email to openrecords@pa.gov. If you choose to file an appeal, you must do so within fifteen (15) days of the mailing date of this letter.

Very truly yours,



Melissa A. Kestermont