

## **FINAL DETERMINATION**

IN THE MATTER OF	:	
	:	
THE HONORABLE FRANK BURNS,	:	
Requester	:	
	:	Docket No: AP 2025-0416
v.	•	Docket No: AF 2025-0410
CAMBRIA COUNTY,	:	
Respondent	:	
	:	

## FACTUAL BACKGROUND

On December 30, 2024, the Hon. Frank Burns ("Requester") submitted a request

("Request") to Cambria County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65

P.S. §§ 67.101 et seq., seeking:

1. The number of voting machines used in Cambria County in the Nov. 5, 2024 election.

2. Copies of any and all policies, directives and results tracking/tallying in effect prior to or on Nov. 5, 2024 regarding the procedure for testing voting machines in Cambria County. This includes, but it not limited to, information on which and how many voting machines were tested (which occurred per Commission 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.

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.

4. A tally of how many ballots cast in Cambria County were unable to be scanned on Election Day of Nov. 5, 2024, and a separate tally of how many ballots were able to be scanned successfully on Election Day of Nov. 5, 2024.

5. The 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.

On February 6, 2025, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the County denied the Request, arguing that Items 1 and 5 seek answers to questions rather than records, that no records responsive to Item 2 exist, and that Items 3 and 4 seek records of a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On February 21, 2025, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial of Items 2, 3, and 4 of his Request and specifically arguing that records should exist and that the County has failed to allege that it conducted the investigation at issue.<sup>1</sup> 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 March 12, 2025, the County submitted a position statement explaining that it had conducted a new search for responsive records and discovered a "Certification of Logic and Accuracy Testing" responsive to Item 2 of the Request and chose to provide it, but that upon consultation with its vendors had discovered that no other records responsive to the Request. In support of this argument, the County submitted the verification of its Election Director, Nicole Burkhardt, who attests that all records were provided and that the County and Department of State

<sup>&</sup>lt;sup>1</sup> Because the Requester did not appeal Items 1 or 5 of the Request, any challenge as to the County's response to those two Items is deemed waived.

had conducted separate investigations which found that, ultimately, all votes had been properly counted.

On May 12, 2025, the Requester filed a position statement<sup>2</sup> arguing that the County had failed to demonstrate that it conducted a good-faith search under the meaning of the RTKL because the Burkhardt attestation was conclusory, that it is unlikely that no policy responsive to Item 2 of the Request exists, that the County had not explained how it searched for records responsive to Item 2 of Item 2 of the Request, and that the County had failed to demonstrate that no records responsive to Item 4 exist. The Requester additionally sought a finding of bad faith against the County.

On May 21, 2025, the County submitted a reply letter, arguing that it had provided all responsive records in good faith, that no responsive policy existed at the time of the Request, and that it had not acted in bad faith but had provided the Requester with relevant documents throughout the process. To illustrate this, the County submitted 322 pages of communications which it had provided the Requester in response to another RTKL request he had filed.

#### LEGAL ANALYSIS

The County is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the County is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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* 

 $<sup>^{2}</sup>$  The Requester sought several extensions to review the County's submission and retain counsel, which the OOR granted over the eventual objection of the County.

*Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, "[t]he burden of proving a record does not exist...is placed on the agency responding to the right-to-know request." Hodges v. Pa. Dep't of Health, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### 1. The appeal is moot in part

During the appeal, the County provided a "Certification of Logic and Accuracy Testing" form responsive to Item 2 the Request. As a result, the appeal as it relates to the Certification provided on appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains). Additionally, though they were not submitted for the purpose of mooting the appeal, the OOR believes that some of the communications submitted alongside the County's May 21, 2025 letter are responsive to Item 3 of the Request, and the appeal is moot as to those documents provided.

# 2. The County has demonstrated that no responsive policy exists, but not that all records were provided in full

On appeal, the County argues that no other records responsive to Items 2-4 the Request exist in the possession, custody, or control of the County. In response to a request for records, "an agency shall make a good faith effort to determine if...the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under...the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct.

2011).

In support of this argument, the County submitted the Burkhardt Attestation, which states

that:

1. Following the retirement of the previous Director of the Bureau of Elections for Cambria County, PA, I assumed the role of Interim Director of the Bureau of Elections for Cambria County, PA, on November 25, 2024.

2. On February 10, 2025, I was officially appointed as the Director of the Cambria County Bureau of Elections and undertook all duties and responsibilities associated with this position from that date forward.

3. I reviewed the requester's right-to-know request dated December 26, 2024; the County of Cambria's written response to the same dated February 6, 2025; and reviewed the appeal filed by the requester.

4. As the newly appointed Director of the Cambria County Bureau of Elections, I was asked to investigate the requests for records that are at issue in the above-referenced appeal.

5. To ensure a comprehensive and complete search for records responsive to the requests, my staff and I searched our internal files and also sought assistance from third-party vendors involved with the November 5, 2024, election.

6. With the assistance of ES&S, the manufacturer of the voting machines used in the November 5, 2024, election, my office discovered a document that, to the best of my knowledge, the former Director of the Cambria County Bureau of Elections did not realize existed, namely, a Certification of Logic and Accuracy Testing verifying that Cambria County, PA completed pre-election logic and accuracy testing for all of its electronic voting system components on September 23, 2024.

7. Having located the document referenced in paragraph 5 of this Attestation, the same has been provided to the requester and is also attached to the County of Cambria's written submission to the OOR in the above-referenced appeal.

8. Following a comprehensive search for records pertaining to County policies, procedures, or directives relating to the testing of voting machines, no such records were discovered and therefore none exist; in addition, the County's post-election due diligence and investigation revealed that William Penn Printing Company - a third party vendor with which the County contracted for printing ballots for the November 5, 2024, election - has no established systems, procedures or protocols in place to verify or confirm accuracy.

9. To the best of my knowledge, information and belief, the County, with the assistance of, and in conjunction with, the Pennsylvania Department of State, conducted an internal investigation regarding ballot-scanning issues that occurred on election day - November 5, 2024.

10.To the best of my knowledge, information and belief, the Pennsylvania Department of State conducted its own independent investigation regarding ballot-scanning issues that occurred on election day- November 5, 2024.

11.To the best of my knowledge, information and belief, as of February 6, 2025the date on which the County provided its written response to the requester's rightto-know requests contained in the requester's letter dated December 26, 2024 - the County had not officially concluded its investigation, nor was the County certain that the Pennsylvania Department of State's independent investigation was officially closed in all respects.

12.Concerning the request for documents explaining "the nature of the problem" and why "the mistake was not able to be discovered until voting commenced", upon consultation with the County Solicitor and after a full and complete search of documents and records in the possession, custody and control of the County, the only pertinent document responsive to the requests referenced in this paragraph is the press release that was announced at a public meeting of the Cambria County Commissioners and provided to the public and media. This document has been provided to the requester and is attached to the written submission of the County in this appeal.

13. I certify that, to the best of my knowledge, information and belief, all ballots cast in Cambria County on November 5, 2024, were scanned successfully and counted.

14.To my knowledge and belief, there are no other documents in the County's custody, possession, or control that are responsive to the requester's requests.

Under the RTKL, a sworn affidavit or statement may serve as sufficient evidentiary

support. See 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). In the absence of any evidence that the County has acted in bad faith, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

On appeal, the Requester focuses on the sufficiency of the Burkhardt Attestation, arguing that it is too conclusory to demonstrate that no responsive records exist.<sup>3</sup> As it concerns Item 2, the County's evidence demonstrates that its Elections Director conducted a search of the County's records and determined that is possesses no policies regarding voting machine testing. Burkhardt Attestation  $\P$  8. Additionally, in its response, the County acknowledges that it is presently working on creating such a policy, but reiterates that none presently exists, and that the document the Requester submitted to show that one should exist is a record of the Department of State, and not a County policy.

Because Item 2 of the Request seeks only policies and the County has submitted an attestation from an individual with actual knowledge demonstrating that the County does not create or maintain arrest records, the County has met its burden of proof. *Campbell v. Pa. Interscholastic Athletic Ass 'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry). Therefore, based on the evidence provided, the County has demonstrated that no records responsive to Item 2 of the Request exist within its possession, custody, or control. *See Hodges*, 29 A.3d at 1192 (Pa. Commw. Ct. 2011); *see also* 

<sup>&</sup>lt;sup>3</sup> The Requester also takes issue with the fact that Ms. Burkhardt is the Elections Director, and not the agency Open Records Officer. The OOR notes that while the RTKL makes the Open Records Officer responsible for receiving RTKL requests and responding, nothing in the law prevents an agency from submitting evidence from other officials, who may be better positioned to ascertain and demonstrate the status of a record. Because the Request seeks election records, the OOR sees nothing improper about relying upon the Elections Director.

*Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022) (concluding that, in the absence of countervailing evidence, an agency may satisfy its burden of proving a record does not exist by submitting "either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record" and that when there is evidence that a record does not exist, evidence of the search for such records may not be required).

However, the Requester's argument that the attestation is conclusory is not without merit. Items 3 and 4 of the Request seek, respectively, correspondence illuminating "the nature of the problem [which prevented ballots from being immediately scanned]"<sup>4</sup> and a tally of those ballots which could or could not be scanned on Election Day, 2024. Each of these Items of the Request was originally denied under Section 708(b)(17); on appeal, the County now argues that no records responsive to either exist. Relevant to this claim, the Burkhardt Attestation provides:

12. Concerning the request for documents explaining "the nature of the problem" and why "the mistake was not able to be discovered until voting commenced", upon consultation with the County Solicitor and after a full and complete search of documents and records in the possession, custody and control of the County, the only pertinent document responsive to the requests referenced in this paragraph is the press release that was announced at a public meeting of the Cambria County Commissioners and provided to the public and media. This document has been provided to the requester and is attached to the written submission of the County in this appeal.

13. I certify that, to the best of my knowledge, information and belief, all ballots cast in Cambria County on November 5, 2024, were scanned successfully and counted.

Burkhardt Attestation ¶¶ 12-13. Paragraph 12 demonstrates that the County conducted a search and consulted with the County Solicitor, but does not explain the *extent* of the search; i.e., what systems were searched, how they were searched, and who was contacted to determine whether

<sup>&</sup>lt;sup>4</sup> The OOR notes that the language of Item 3 of the Request is somewhat unclear; nevertheless, the County has not raised any argument that it is insufficiently specific under Section 703 of the RTKL, and so the OOR must assume that the parties understand the nature of the records at issue. 65 P.S. § 67.703.

such communications exist. Meanwhile, paragraph 13 answers the question animating the request for records in Item 4 but does not actually assert that the records sought—a tally of votes counted—does not exist, or what process the County used to make that determination. As a result, the OOR is constrained to find that the County has not demonstrated that it conducted a good faith search for records responsive to Items 3 and 4 of the Request.

# 3. The County has not demonstrated that the records relate to a noncriminal investigation

In its response to the Request, the County originally denied Items 3 and 4 of the Request because they seek records related to a noncriminal investigation. Although it alleges on appeal that no records exist, it nevertheless submitted some evidence intended to show that such investigations were ongoing.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "complaints," "[i]nvestigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would...[r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(i); 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). For this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental

information-gathering could be shielded from disclosure." Id. at 259.

As mentioned above, the Burkhardt Attestation provides that:

9. To the best of my knowledge, information and belief, the County, with the assistance of, and in conjunction with, the Pennsylvania Department of State, conducted an internal investigation regarding ballot-scanning issues that occurred on election day - November 5, 2024.

10.To the best of my knowledge, information and belief, the Pennsylvania Department of State conducted its own independent investigation regarding ballot-scanning issues that occurred on election day- November 5, 2024.

11.To the best of my knowledge, information and belief, as of February 6, 2025the date on which the County provided its written response to the requester's rightto-know requests contained in the requester's letter dated December 26, 2024 - the County had not officially concluded its investigation, nor was the County certain that the Pennsylvania Department of State's independent investigation was officially closed in all respects.

Burkhardt Attestation ¶¶ 9-11. Generally speaking, an agency may not claim an exemption under

Section 708(b)(17) due to the investigation of another agency, but the OOR acknowledges that two agencies may act in tandem during an investigation and share exempt documentation. Here, however, even if the OOR accepts that the County and Department of State were investigating the County's voting troubles on November 5, the County has submitted no evidence tending to show that the records sought by Items 3 or 4 are investigative records.<sup>5</sup> As a result, the OOR cannot find that the records responsive to Items 3 or 4 of the Request, to the extent that any exist, are exempt under Section 708(b)(17). Therefore, the appeal must be granted as to Items 3 and 4 of the Request.

Nevertheless, the OOR is mindful that an agency cannot be required to produce records that do not exist. 65 P.S. § 67.705. If the County completes its search for communications and responsive to the Request and determines that no additional records exist, it must provide the Requester with an attestation explaining the search for each set of records and affirming that no

<sup>&</sup>lt;sup>5</sup> In fact, as noted above, the County's current position is that no such records exist at all.

additional responsive records exist within its possession, custody or control.

### 4. The OOR declines to make a finding of bad faith

The Requester asks the OOR to make a finding of bad faith, arguing primarily that because the County did not demonstrate that it performed a good faith search in response to the initial filing of the Request, it has violated its statutory duties. While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. See generally 65 P.S. § 67.1304(a) (noting that a court "may award reasonable attorney fees and costs of litigation...if the court finds...the agency receiving the...request willfully or with wanton disregard deprived the requester of access to a public record...or otherwise acted in bad faith...."); 65 P.S. § 67.1305(a) ("A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith"). Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 243 A.3d 19, 28-29 (Pa. 2020); California Univ. of Pa. v. Bradshaw, 210 A.3d 1134 (Pa. Commw. Unpub. 2021) appeal denied 2019 PA LEXIS (Pa. 2019) (awarding attorney's fees, costs and statutory damages for bad faith when the University failed to contact third-party contractor in search for records prior to asserting that no responsive records exist and subsequently litigating the frivolous basis for denial);<sup>6</sup> Office of the Dist. Atty. of Phila. v. Bagwell, 155 A.3d 1119 (Pa. Commw. Ct. 2017) (a finding of bad faith was warranted where the agency based a denial on the identity of the requester, refused to provide a legal rationale for denial and did not perform a good faith search).

In the instant matter, the facts do not warrant a finding of bad faith. Although the OOR has concluded that the County's attestation is conclusory, there is no serious evidence in the record

<sup>&</sup>lt;sup>6</sup> An unpublished opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

to show that the County did not conduct searches for responsive records, first in response to the Request and then in response to the filing of the Appeal. Although the provision of the Certification of Logic and Accuracy Testing on appeal clearly demonstrates that the County's original search was insufficient, the OOR is unaware of any case in which an agency's accidental withholding of a responsive document has been the basis for a finding of bad faith. Although the OOR has rejected some of the County's arguments on appeal, there is no evidence at all that these arguments were made in bad faith; to the contrary, the County has been timely, attentive, and professional in both its responses to the Requester and to the OOR and has made serious attempts to provide the Requester with the information he is seeking.

#### CONCLUSION

For the foregoing reasons, the appeal is **granted in part**, **denied in part**, and **dismissed as moot in part**, and the County is required to provide all records responsive to Items 3 and 4 of the Request, or a detailed attestation describing its search, within 30 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 Cambria 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 according to court rules as per 65 P.S. § 67.1303, but 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>7</sup> All documents or communications following the issuance of this Final Determination shall be sent to <u>oor-postfd@pa.gov</u>. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

<sup>&</sup>lt;sup>7</sup> Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

## FINAL DETERMINATION ISSUED AND MAILED: June 2, 2025

/s/ Jordan Davis

JORDAN C. DAVIS SENIOR APPEALS OFFICER

Sent to:

Hon. Frank Burns (via e-file portal); Allyson Lonas, Esq. (via e-file portal); Melissa Kestermont, AORO (via e-file portal) Ronald Repak, Esq. (via e-file portal)