COMMONWEALTH OF PENNSYLVANIA

OFFICE OF OPEN RECORDS

IN THE MATTER OF

FRANK BURNS,
Requester

v.

CAMBRIA COUNTY,
Respondent

Docket No.: AP 2025-0416

Respondent's Position Statement

Filed on Behalf of:
Cambria County, Respondent

Counsel of Record for this Party:
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RESPONDENT'S POSITION STATEMENT

AND NOW, comes the Respondent, Cambria County ("the County"), by and through its counsel, Ronald N. Repak, Esquire, of Dillon, McCandless, King, Coulter & Graham, L.L.P., and files the following Position Statement in response to the appeal filed by Requester, Frank Burns; and, in support thereof, submits the following.

A. BACKGROUND

Frank Burns ("Burns") appeals from the County's denial of the following requests made in Burns's request dated December 26, 2024 ("the request"), filed under the Pennsylvania Right to Know Law ("RTKL"), Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104. The requests at issue in this appeal are as follows:

> ["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 to 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.

Burns's request dated December 26, 2024, contained a total of five (5) separate requests. Burns acknowledged in his appeal that he did not appeal the County's denial of Request 1 or Request 5, as both requests asked questions rather than request records. Burns timely appealed the County's denial of Request 2, Request 3, and Request 4, and this appeal is properly before the Pennsylvania Office of Open Records for disposition.

B. LEGAL ANALYSIS

"[A]n agency may satisfy its burden of proof that it does not possess a requested record with *either an unsworn attestation by the person who searched for the record or* a sworn affidavit of nonexistence of the record . . . . In this context, [unsworn attestations or] [a]ffidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies [the agency's granting or denial of a request]. *The [unsworn attestation or] affidavits must be detailed, nonconclusory, and submitted in good faith . . . . In other words, a generic determination or conclusory statements are not sufficient* . . . (emphasis added). ***Moore v. Dep't of Corr.***, 177 A.3d 1073 (Pa. Commw. 2017) (internal citations omitted). Furthermore, "[w]here . . . no evidence has

been presented to show that [an agency] acted in bad faith, the averments in [the agency's unsworn attestation or] affidavit[ ] should be accepted as true." ***McGowan v. Pa. Dep't of Envtl. Prot.***, 103 A.3d 374, 382-83 (Pa. Commw. 2014).

Request 2, Request 3 and Request 4 are collectively and fully addressed in the Attestation of Nicole Burkhardt, the current Director of the Bureau of Elections for Cambria County, PA, a true and correct copy of which is attached to this written submission, fully incorporated herein, and marked "Exhibit A". As detailed in the attached Attestation, the County's first response to the request was influenced and guided by the statements of the now-retired Director of the Cambria County Bureau of Elections about the unavailability of certain files. Upon her official appointment as the new Director of the Cambria County Bureau of Elections, Nicole Burkhardt and her staff explored the Bureau's internal files *and also* sought assistance from external vendors engaged in the election to ensure a comprehensive and complete search for records responsive to Burns's requests.

Consistent with the Attestation of Nicole Burkhardt, the County is providing *all records* which are responsive to Burns's requests. Said records are attached to this written submission, fully incorporate herein, and marked "Exhibit B".

As Burns noted within his appeal, he did not appeal the County's denial of the following request: "["Request 1"] The number of voting machines used in Cambria County in the November 5, 2024, election." The County previously denied Request 1 on the basis that "[u]nder 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. 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 . . . .').

C. CONCLUSION

In closing, the County respectfully submits that Burns's appeal should be dismissed, as the County has provided all records which exist and are responsive to the request. Furthermore, the Attestation, together with the records submitted in this appeal, validates the statements made by the County in response to the questions posed in this RTKL matter and clears up any misconceptions regarding the County's honest and good-faith conduct during the election on November 5, 2024.

Respectfully Submitted,

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ATTESTATION

Date: March 12, 2025

Agency: Cambria County

Requester: Rep. Frank Burns

Records Requested: Appeal Docket No. # AP-2025-0416

I, Nicole Burkhardt, currently serve as the Director of the Bureau of Elections for Cambria County, PA. I make the following statements under penalty of perjury as more fully set forth in 18 Pa. C.S. § 4904. To the best of my knowledge, information and belief, and following a comprehensive and good-faith search carried out by my staff and me for the requested records at issue in OOR Appeal Docket No. AP-2025-0416, I hereby state the following:

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, 2025 – the date on which the County provided its written response to the requester's right-to-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.

I have made the above statements under penalty of perjury as more fully set forth in 18 Pa. C.S. § 4904. My contact information, including telephone number and email address, is:

Nicole Burkhardt, Bureau of Elections Director
200 South Center Street
Ebensburg, PA 15931
(814) 472-1607

Date: 3/12/25 By: Nicole M. Burkhardt
Nicole Burkhardt

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
CERTIFICATION OF LOGIC AND ACCURACY TESTING

County name: CAMBRIA Election date: 11/05/2024

Number of precincts participating in election: 125

Voting system vendor: ELECTION SYSTEMS AND SOFTWARE

Voting system name and version: ES&S EVS 6.1.1.0

Primary system configuration: ☒ hand-marked paper ballots ☐ ballot-marking devices

I do hereby certify that CAMBRIA County has completed pre-election logic and accuracy testing for all its electronic voting system components pursuant to the Directive on Logic and Accuracy Testing on (date) 09/23/2024.

During the test process, a predetermined test deck was prepared, and ballots were marked and tabulated. The results reported by the voting system matched the expected results, and the testing included all equipment to be used for the election, including backup devices.

The testing included the following:

Component	Details	Completed?
Test Deck • The test deck included absentee, mail-in, Election Day, and provisional ballots (ballot sets) for each precinct (ballot styles). • The test deck included ballots produced on all vendor and county BOD printers and BMDs.	Test pattern used in the test deck: Recommended (unique totals) ☐ Incremental/Decremental ☐ Alternating ■	Yes ☒ No ☐
Notice • The county board timely notified the chair of each recognized political party.	Notice was sent to the chairman of each recognized political party on 09/16/2024.	Yes ☒ No ☐
• The county board timely notified each registered citizens' organization.	Notice was sent to the chair or presiding officer of each registered citizens' organization on _____.	Yes ☐ No ☐ N/A ■
• The county board provided at least 48 hours' notice to the public.	The county board provided public notice on 9/16/24.	Yes ☒ No ☐
Ballot-Marking Devices (BMDs) and Backup BMDs • Each BMD was tested to ensure functionality for each feature. • Printed ballots matched candidate selections on screen. • Ballots created by BMD were included in the test deck to enable testing of precinct scanners. • Hybrid BMDs accurately tabulated results.	Standard BMDs ■ Hybrid BMDs ☐ # of BMDs to be deployed: 125 # of BMDs tested: 125 # of backup BMDs in reserve: 7 # of Backup BMDs tested: 4	Yes ☒ No ☐

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Precinct Scanners and Backup Scanners • Test deck was scanned into each precinct scanner that will be deployed. • Ballots were accepted and rejected appropriately. • Ballots produced the expected results.	# of scanners to be deployed: 125 # of scanners tested: 125 # of backup scanners in reserve: 7 # of backup scanners tested: 4	Yes ☒ No ☐ N/A ☐
Central Count Scanners and Backup Scanners • Test deck was scanned into each Central Count Scanner that will be used. • Ballots were accepted and rejected appropriately. • Ballots produced the expected results.	# of scanners to be deployed: 1 # of scanners tested: 1 # of backup scanners in reserve: 1 # of backup scanners tested: 1	Yes ☒ No ☐

Signature of Chief Clerk or Authorized Representative	MARYANN DILLON Name of Chief Clerk or Authorized Representative	09/28/2024 Date

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