

elector of Allegheny County and argues that “[i]f the County provides electronic scans on the pre-appeal timeline provided for by the RTKL instead of allowing only in-person inspection, and objects to the disclosure of signature despite the other supporting laws, this Request supports voluntarily limiting the request to the front side of the envelope only.”

On October 19, 2021, the County invoked a thirty-day extension of time to respond. *See* 65 P.S. § 67.902. When the County failed to issue a final response by November 18, 2021, the Request was deemed denied on that date. *See* 65 P.S. § 67.902(b)(2).

On November 22, 2021, the Requester appealed to the OOR, stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On December 6, 2021, the County submitted a position statement indicating that the Requester is entitled to view the declaration envelopes, without reference to voter signature. Due to the high number of mail-in/absentee ballots received by the County, no electronic documentation was created regarding these declaration envelopes. The declaration envelopes exist, however, in no particular order, in boxes in the Allegheny County Elections Warehouse. The County indicates that the Requester is free to view these envelopes and is free to contact Allan Opsitnick, Assistant County Solicitor, to make arrangements to view the envelopes. In sum, the County argues that while the Requester is entitled to view the declaration envelopes, he must do so without reference to voter signature.¹

On December 6, 2021, the Requester submitted a position statement. In his position statement, the Requester provides background information regarding his appeal and requests a finding of bad faith against the County. Requester also makes the following argument:

¹ It is unknown how the County planned on redacting the voter signature from the declaration envelopes.

As specifically cited in the request, the sought records are expressly made public by 25 P.S. § 2648 and 25 P.S. § 1402. The latter explicitly makes the district register and voter signatures in the district register available for public inspection. (Requester has also previously held custody of his precinct's District Register for multiday periods when serving as an elected Judge of Election.) The presence of voter signature on declaration envelopes was given as the grounds for denial of a request to be able to view and photograph records made directly under the Election Code. If, for some reason, the OOR somehow finds for the opposite of 25 P.S. § 1402 in protecting voter signatures from declaration envelopes, Requester would not object to the County redacting signatures from digital images of the signature side of the envelope. This process could be automated by technology, but Requester does not believe such redaction is necessary based on the clear text of the law making signatures available for inspection as part of the public record. The public status of this part of the records requested appears to be disputed, and the OOR should resolve that dispute in its final determination. Requester believes that dispute should be resolved in favor of making the records fully public, as indicated by 25 P.S. § 1402.

Additionally, the Requester provided the attestation of Ronald Bandes, a registered elector of Allegheny County, who attests that he attempted to make arrangement with the Elections Division to view and photograph declaration envelopes and his request was denied.

On December 20, 2021, the OOR issued a Final Determination, denying the appeal in part and dismissing it as moot in part.

On January 3, 2022, the Requester filed a Petition for Reconsideration ("PFR"), arguing 1) that the County failed to submit evidence to meet its burden that any exemptions apply to exempt the requested records, 2) that the requested records are presumed public under the RTKL and the presumption is not overridden by any prohibition from another law, 3) that "[s]ignatures are part of public general register information,"² and 4) that the County acted in bad faith. On January 18, 2022, the OOR granted the PFR noting that Section 1404(a) of the Voter Registration Act does not appear to be at issue in the instant Appeal. On February 2, 2022, the Requester filed an additional position statement and another affidavit from Mr. Bandes.

² Requester cites to 25 P.S. § 2648 to include that the signature of the registered elector is subject to public inspection.

On February 2, 2022, the County submitted an answer arguing that the Final Determination was correct and that the provisions of the Pennsylvania Election Code control, specifically 25 P.S. § 3146.9.

In response, on February 3, 2022, the Requester objected to the County's late submission and further argued that the OOR should not consider any new argument raised by the County in its February 2, 2022 submission.³

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.

³ The OOR may not consider new evidence upon reconsideration but must look at the record as it was in the original appellate process. The OOR may utilize the Petition for Reconsideration and any Answer filed thereto as a guide for re-examining the original evidence only. Here, , the County did not submit any new evidence; however, the County did submit additional argument supporting its position that signatures on declaration ballots are exempt from disclosure.

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)). 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 County may not exempt signatures from disclosure

The Requester argues that the County failed to satisfy its burden that the electronic signature on the declaration envelopes are exempt from disclosure. The County argues that Section 3146.9 of the Pennsylvania Election Code states that “no proof of identification shall be made public” and that the absentee and mail-in declaration envelopes contain a bar code on the front of

the envelope which can, if publicly examined and recorded, lead to the identification of a ballot. The OOR's initial Final Determination relied on the Voter Registration Act, 25 Pa.C.S. 1404(a) (establishing a database of individual registered electors, 1404(b)(1) (“[t]he secretary may promulgate reasonable regulations governing access to the list”), and the Department of State regulations, 4 Pa. Code §§ 1831.1-.18. Upon review, and noting that the Request seeks declaration ballots as opposed to voter registration lists, the OOR now relies on Article XIII of the Election Code.

Article XIII of the Election Code provides, in pertinent part:

(a) General rule. All official absentee ballots, files, applications for ballots and *envelopes* on which the executed declarations appear, and all information and lists are hereby 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 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 an absentee 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 absentee 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. § 3146.9 (emphasis added); *see also* 25 P.S. § 3150.17(a) (setting forth that the same records for mail-in ballots are also “designated and declared to be public records”).

Thus, the Election 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.” The RTKL does not “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. 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”). While the Election Code states that “no proof of identification shall be made public,” this does not mean signatures; rather, the term “proof of identification” commonly means official government documents establishing the identity of an individual, such as a driver’s license or passport. *See* 1 Pa.C.S. § 1903(a) (“Words and phrases shall be construed ... according to their common and approved usage”). Therefore, because the Election Code makes the declaration envelopes public, the Requester is entitled to view the “envelopes on which the executed declarations appear,” pursuant to the Election Code’s access provisions. *See* 25 P.S. § 2648.

2. The OOR declines to make a finding of bad faith

The Requester asserts that the County acted in bad faith when responding to the Request. 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.”).

The Requester bears the burden of proving an agency committed bad faith by demonstrating the agency did not make a good faith effort to find and obtain responsive records

before denying access. *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281 (Pa. Commw. Ct. 2014). To support a finding of bad faith, the Requester submits the attestation of Mr. Bandes, a registered elector of Allegheny County, who attests that he attempted to make arrangements to view and photograph declaration envelopes. Mr. Bandes is not a party to the instant appeal.

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.*, 2020 Pa. LEXIS 6488, at *20-21 (2020). Bad faith involves failing to perform a detailed search and review of records to ascertain if the requested material exists or if any exclusion may apply prior to denial of access. *Id.* The OOR has held that the Requester is permitted to inspect the records in their entirety under the Election Code. The County may appeal this Final Determination, 65 P.S. § 67.1302; if the County does not and the Requester believes that the County has not complied with the Final Determination, the Requester has a remedy of seeking to enforce the Final Determination. *See, e.g., Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 607 (Pa. Commw. 2017) (holding that a civil action in mandamus is an appropriate vehicle to seek enforcement of an unappealed OOR determination against a local agency). At this stage, the OOR cannot merely assume that the County will not comply with the Final Determination, the RTKL, or the Election Code. Further, although the OOR is holding that the County may not redact the declaration envelopes, the OOR cannot conclude that the County's argument to the contrary is an act of bad faith. Accordingly, the record does not support a finding of bad faith in this matter.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to grant access to the requested records, subject to the provisions of the Election Code, within thirty days. This Final Determination Upon Reconsideration is binding on all parties. Within thirty

days of the mailing date of this Final Determination Upon Reconsideration, any party may appeal to the Allegheny 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. 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.⁴ This Final Determination Upon Reconsideration shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION UPON RECONSIDERATION ISSUED AND MAILED:
15 February 2022**

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent to: William Towne (via email);
Alan Opsitnick, Esq. (via email);
Jerry Tyskiewicz, AORO (via email)

⁴ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).