

IN THE COURT OF COMMON PLEAS FOR FULTON COUNTY, PENNSYLVANIA

WITOLD WALCZAK AND THE
AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA,

Plaintiffs/Requesters,

v.

FULTON COUNTY,

Defendant/Respondent.

No.: _____

COMPLAINT IN MANDAMUS

Filed on Behalf of the Plaintiffs,
Witold Walczak; American Civil Liberties
Union of Pennsylvania

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JURY TRIAL DEMANDED

Office of Open Records Docket No.: AP 2021-1661

IN THE COURT OF COMMON PLEAS FOR FULTON COUNTY, PENNSYLVANIA

WITOLD WALCZAK AND THE)	No.: _____
AMERICAN CIVIL LIBERTIES UNION OF)	
PENNSYLVANIA,)	
)	
Plaintiffs/Requesters,)	
v.)	COMPLAINT IN MANDAMUS
)	
FULTON COUNTY,)	
)	JURY TRIAL DEMANDED
Defendant/Respondent.)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

FRANKLIN COUNTY BAR ASSOCIATION
FIND A LAWYER SERVICE
100 Lincoln Way East, Suite E
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717-660-2118

IN THE COURT OF COMMON PLEAS FOR FULTON COUNTY, PENNSYLVANIA

WITOLD WALCZAK AND THE)	No.: _____
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)	
FULTON COUNTY,)	
)	
Defendant/Respondent.)	JURY TRIAL DEMANDED

COMPLAINT IN MANDAMUS

AND NOW, come the Plaintiffs, Witold Walczak and the American Civil Liberties Union of Pennsylvania (ACLU-PA), by and through their undersigned counsel, at Saul Ewing Arnstein & Lehr LLP and the ACLU-PA, and hereby submit this Complaint in Mandamus to enforce a Final Determination of the Office of Open Records:

I. INTRODUCTION

1. Plaintiffs seek an order to compel Respondent Fulton County to comply with a final order from the Office of Open Records (“OOR”) that directs production of *all* records responsive to Plaintiffs’ request under the Pennsylvania Right to Know Law (“RTKL”) regarding Fulton County’s review of its 2020 general election.

2. The OOR’s September 13, 2021 order became final and enforceable on October 14, 2021, after Fulton County failed to file a timely appeal. *See* “OOR Final Determination,” attached as **Exhibit A**. Shortly thereafter, Fulton County produced 691 records.

3. Fulton County’s production is patently deficient. Fulton County failed to produce responsive records: a) identified in the production, b) given to another requester, c) discussed in

news articles, and d) that logically must exist, such as financial transaction records, meeting minutes and draft reports.

4. Fulton County's bad faith in failing to comply with the RTKL and OOR order is amplified by the fact that none of the 691 records they eventually produced fit the legal exemptions they relied on initially to refuse any production. The County also has refused to produce an index of responsive documents, even disregarding an OOR order to do so.

5. The Fulton County commissioners' blatant non-compliance with long-established RTKL law and the OOR's September 13 order is unlawful and must be sanctioned. "[T]he objective of the RTKL . . . is to empower citizens by affording them access to information concerning the activities of their government." *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 243 A.3d 19, 33 (Pa. 2020) (citation omitted). Fulton County has willfully and wantonly obstructed the RTKL's plain language and purpose.

6. Besides identifying the missing records and directing Defendant to make full production, Plaintiffs also request that this Court order Respondent to pay civil penalties, and to reimburse Plaintiffs for their legal fees and related costs for this enforcement action, because the County acted in bad faith by failing to comply with its duties under the RTKL.

II. THE PARTIES

7. Plaintiff/Requester, the American Civil Liberties Union of Pennsylvania (ACLU-PA), is a nonprofit, nonpartisan organization working to protect civil liberties and constitutional rights. The ACLU-PA's focus includes principles of open government and voting rights.

8. ACLU-PA's principal office is in Philadelphia, Pennsylvania, with additional offices in Pittsburgh and Harrisburg.

9. Plaintiff/Requester, Witold Walczak (“Walczak”), is the ACLU-PA’s legal director. Collectively, ACLU-PA and Mr. Walczak are referred to as “Plaintiffs.”

10. Defendant/Respondent, Fulton County (“Fulton County” or “Defendant”), is a local government entity, led by the three-member Fulton County Commission.

11. The County maintains governmental offices at 116 W. Market Street
McConnellsburg, PA 17233.

12. The County is a Local Agency pursuant to Section 102 of the Pennsylvania Right to Know Law (“RTKL”). *See* 65 P.S. § 67.102.

III. JURISDICTION

13. This Court has jurisdiction over a complaint in mandamus filed under Pa. R. Civ. P. 1093 and 1095. *See also* 42 Pa.C.S. § 931(a) (providing for original jurisdiction of the Court of Common Pleas).

14. A writ of mandamus compels the government’s performance of a mandatory and ministerial duty where a plaintiff has “a clear legal right.” *Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 606 (Pa. Commw. Ct. 2017).

15. The Right-to-Know Law imposes a mandatory and ministerial duty upon a government agency to provide public records to a requester. *Id.*

16. A final determination by the Office of Open Records that the requested records are disclosable means the requester has established a clear right to have the agency produce those public records. *Id.*

17. Therefore, under Pennsylvania law, a complaint in mandamus is the appropriate mechanism to enforce a Final Determination of the Pennsylvania Office of Open Records. *Capinski*, 164 A.3d at 607.

18. Additionally, this Court has jurisdiction to review Final Determinations of the Office of Open Records pursuant to Section 1302 of the RTKL. *See* 65 P.S. § 67.1302(a).

IV. FACTUAL AND PROCEDURAL HISTORY

A. **Plaintiffs' Initial RTKL Request and the County's Response.**

19. Earlier this year, the Fulton County Commissioners ("the Commissioners") attracted national public attention for allowing an unaccredited third-party contractor, Wake Technology Services, Inc. ("Wake TSI"), to inspect its voting machines and election data as part of a controversial 2020 general-election review.

20. In July, the Pennsylvania Department of State decertified Fulton County's voting machines because the County violated state law and mandatory security protocols for the machines when it granted access to Wake TSI. *See* Degraffenreid Letter, attached as **Exhibit B**.

21. On July 16, 2021, Plaintiffs, through Mr. Walczak, made a request to Fulton County pursuant to the RTKL. The request sought:

Any record [] involving or referencing the November 3, 2020, or May 18, 2021, elections that relates to, references, or involves:

1. An audit, canvass, or any type of post-election review including, but not limited to, requests for such a review (including but not limited to a request made by State Senator Doug Mastriano); internal and external discussions about such a review, including emails; responses to review requests; and any actions taken in furtherance of such a review; and
2. A discussion of cost and funding to pay for an audit, canvass or review of the above-referenced elections.

See the "Request," attached as **Exhibit C**.

22. Plaintiffs' RTKL request was specific, particular, and narrowly tailored. *See* 65 P.S. § 67.703 (discussing requirements for a written request under the Right to Know Law). It focused on documents and discussions related to Fulton County reviews of the November 3, 2020, and May

18, 2021, elections, and associated funding and costs. Plaintiffs' request "describe[d] the records sought with sufficient specificity" to enable the County to ascertain responsive records.

23. On July 22, 2021, the County formally denied Plaintiff's request, invoking exemptions for "internal, predecisional deliberations," 65 P.S. § 67.708(b)(10)(i)(A), and records "relating to a noncriminal investigation." 65 P.S. § 67.708(b)(17). *See* Fulton County's Denial of Plaintiffs' Request, attached as **Exhibit D**.

24. The County did not claim that there were no responsive records. They claimed that whatever responsive records they did have were exempt from disclosure. *See* Exhibit D.

25. The County's response further violated the RTKL because it did not identify responsive records that were exempt from disclosure. *See* 65 P.S. § 67.903. The County did not identify any records. The RTKL requires the responding agency to provide affidavits, indexes, or privilege logs explaining why each identified document was exempt from disclosure. 65 P.S. § 67.708; *see also UnitedHealthcare of Pa., Inc. v. Pa. Dep't of Human Svcs.*, 187 A.3d 1046, 1059 (Pa. Commw. Ct. 2018).

B. Plaintiffs Appealed to the Office of Open Records, Which Issued a Final Determination Ordering Fulton County to Produce All Responsive Documents.

26. On August 12, 2021, Plaintiffs timely appealed to the Pennsylvania Office of Open Records. The OOR invited the parties to supplement the record and directed Fulton County to notify affected third parties that they could participate in the appeal. *See* 65 P.S. § 67.1101(c).

27. On September 13, 2021, the OOR issued the Final Determination, ordering full disclosure of all requested records to Plaintiffs. *See* Exhibit A.

28. The OOR held that, "[b]ecause the County has not identified the responsive records at issue or submitted any evidence in support of its denial, the County has not demonstrated that any exemption applies." *See* Exhibit A at 8.

29. The Final Determination concluded that, “the Requester’s appeal is **granted** and the County is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties.” *See* Exhibit A at 9 (emphasis in original).

C. Fulton County Neither Timely Appealed the OOR’s Final Determination Nor Complied with the Order.

30. Fulton County failed to appeal within thirty (30) days of the Office of Open Records’ Final Determination. Fulton County also did not produce responsive documents by the deadline.

31. The Final Determination is, thus, binding on both parties.

32. On October 21, 2021, after the deadline passed, Fulton County produced 691 documents.

33. Many documents in this production were irrelevant, and thus unresponsive to Plaintiffs’ Request.

34. Moreover, the production did not contain any affidavits detailing the search its open records officer conducted for documents responsive to a RTKL request. *See Off. of the Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017).

35. The production did not contain any affidavits attesting that certain requested records did not exist. *See Smith Butz, LLC v. Pa. Dep’t of Env’t Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

36. The production did not contain any affidavits identifying documents withheld under a privilege or RTKL exemption, and explaining why such an exemption would apply to each document. *See Bagwell*, 155 A.3d at 1130; *UnitedHealthcare*, 187 A.3d at 1059

37. Nor did the production contain any index or privilege log detailing documents that were withheld under an exemption to the RTKL. *See UnitedHealthcare*, 187 A.3d at 1059.

38. Despite the absence of affidavits or logs certifying the withholding of some responsive records, it is clear Fulton County did not produce all responsive records in their possession. The deficiencies are evident because 1) records referenced in documents produced to Plaintiffs are missing; 2) responsive documents produced to another requester, American Oversight, were not produced to Plaintiffs; 3) responsive records discussed in news accounts are missing; 4) records that logically must exist, such as financial documents and draft reports, were not produced or identified for withholding; and 5) the production contains no records covered by the two exemptions Fulton County invoked to refuse production.

a) Defendant did not produce contracts and email communications that are discussed in the production.

39. Fulton County failed to produce several responsive records referenced in the documents already produced to Plaintiffs, including:

- Any contracts or contractual documents with Wake TSI, including a December 31, 2020, contractual document signed by Gene Kern and Patti Hess which included handwritten commentary that “Wake TSI is contracted to Defending the Republic a 501(c)4.” *See, e.g.*, Email from Patti Hess to Matt Shuham, attached as **Exhibit E**.
- Any communications about the election review between Gene Kern and the private email addresses of Commissioner Stuart Ulsh or Commissioner Randy Bunch. *See, e.g.*, Email from Stuart Ulsh to Gene Kern, attached as **Exhibit F**. Records of official business conducted using unofficial systems or stored outside of official files are still subject to the Right-to-Know Law. *See, e.g., Barkeyville Borough v. Stearns*, 35 A.3d 91, 95–97 (Pa. Commw. Ct. 2012).
- Any communications between County officials and Senators Doug Mastriano or Judy Ward about the election review, even though the production references such communications. *See, e.g.*, Dominion Meeting Notes, attached as **Exhibit G**.

b) Defendant did not produce email communications disclosed to American Oversight.

40. Fulton County failed to produce two responsive email records that have already been produced to American Oversight as part of that organization's RTKL request, including:

- An email from Commissioner Ulsh to Senator Ward, Representative Jesse Topper, and Commissioner Bunch on November 9, 2020, stating that "Wolf can't be left allowing to do this" regarding the November 2020 election.
- An email from Commissioner Bunch to Senator Ward on November 12, 2020, asking if there is anything he can do to stop the election from getting "stolen."

c) Defendant did not produce email communications, draft reports, constituent communications, and meeting minutes that have previously been reported in news accounts.

41. Fulton County failed to produce responsive records that are discussed in existing news accounts of the County's election review (*see* Rosalind S. Helderman, "It Was Like This Rogue Thing," Washington Post, June 6, 2021, attached as **Exhibit H**), including:

- Wake TSI's request on December 29, 2020, to review the county's election results.
- A February 2020 draft of the report compiled by Wake TSI summarizing its findings from its election review.
- Emails and letters between county officials and the Pennsylvania Department of State, including a May 4, 2021, letter from County Director of Elections Patti Hess to Secretary of State Veronica Degraffenreid.
- Emails from residents of Fulton County inquiring about the purpose of the Wake TSI election review, including January 2021 communications between the commissioners and county residents Kimbra and Dayton Tweedy.
- Meeting minutes from a January 2021 or February 2021 Commission meeting where the Commissioners met with the Tweedy's.
- Meeting minutes from Commission and Election Board meetings in January and February 2021, where the Commissioners discussed and approved the Wake TSI request.
- Emails between Elections Director Patti Hess and county elections directors from across the state discussing requests from Senators Cris Dush, Doug Mastriano, and Judy Ward to conduct an election review.

d) Defendant did not produce any records covered by the two exemptions Fulton County invoked to refuse production.

42. In denying Plaintiff's request, Fulton County claimed that certain records were exempt under the RTKL's exemptions for records involving "internal, predecisional deliberations," 65 P.S. § 67.708(b)(10)(i)(A), and records "relating to a noncriminal investigation." 65 P.S. § 67.708(b)(17). *See* Exhibit D.

43. However, Fulton County did not produce any documents that would fall under either exemption.

44. No produced document contains notes, meeting minutes or communications involving the pre-decisional deliberations of the Commission or other County officials regarding the Wake TSI assessment.

45. Moreover, while some produced emails and letters relate to the Pennsylvania Department of State's inquiry into the Wake TSI review of Fulton County elections, this inquiry is not confidential – the Department of State has publicly posted all letters sent to Fulton County officials on its website – and therefore these documents would not be covered by the asserted exemption.

e) Defendant did not produce several documents that must exist given the nature of an election review.

46. Fulton County failed to produce several types of responsive records that should exist given the nature of an election review conducted by a third-party entity like Wake TSI, including:

- Accounting and payment records such as invoices, checks, and budgets. Financial records are disclosable public records under the RTKL, and the purpose of the Act is "to permit the scrutiny of the acts of public officials and to make them accountable for their use of public funds." *Buehl v. Pa. Dep't of Corr.*, 955 A.2d 488, 493 (Pa. Commw. Ct. 2008).
- Any payment records in Wake TSI's possession, including records of third-party donations for the review. Records in the possession of a third-party contractor that "directly" relate to the governmental function the third party

contracts to perform “shall be considered a public record of the agency for purposes of [the RTKL].” 65 P.S. § 67.506(d).

- Additional responsive records in Wake TSI’s possession, including drafts of the report summarizing the review, records explaining the methods used to conduct the review, and records describing how Wake TSI maintained the security of any election information or technology turned over by the County.
- Documents and other items provided to Wake TSI to conduct the review, including all documents set forth in the Wake TSI Election Systems Analysis dated February 19, 2021. *See* Wake TSI Analysis, attached as **Exhibit I**. These documents include, but are not limited to: error log files from scanning tabulation machines, other scanning tabulation machine files, and election management system (EMS) log files.

47. In short, Fulton County failed to produce all documents responsive to Plaintiffs’ Request, in direct contravention of the OOR Final Determination and the RTKL.

D. The County Acted in Bad Faith by Failing to Comply with its Duties under the RTKL and Willfully Depriving Plaintiffs of Access to Public Records.

48. In failing to fully comply with Plaintiff’s request and the Final Determination of the OOR, the County acted in bad faith. Plaintiffs are therefore entitled to attorney fees and related costs under the RTKL.

49. When a court grants access to a record after an agency denies a RTKL request, the court “may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester” if the court finds that:

- (1) the agency receiving the original request acted willfully or with wanton disregard in depriving the requester of access to a public record, **“or otherwise acted in bad faith under the provisions of this act”** or
- (2) “the exemptions, exclusions or defenses asserted by the agency in its final determination **were not based on a reasonable interpretation of law.**”

See 65 P.S. § 67.1304 (emphasis added). *See also Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 243 A.3d 19, 34 (Pa. 2020) (affirming that Section 1304(a)(1) permits recovery of attorney

fees when the receiving agency determination is reversed by the OOR, and the agency deprived a requester of access to records in bad faith).

50. Moreover, a court may impose a civil penalty up to \$1,500 if an agency denied access to a public record in bad faith. 65 P.S. § 67.1305.

51. Whether an agency showed willful or wanton disregard for a requester's rights, or otherwise acted in bad faith regarding a request under the RTKL, depends on the following factors:

- The degree of noncompliance with its duties under the law.
- The repercussions of that noncompliance.
- Delays in complying with OOR or court orders to produce documents.
- The duration an agency withholds public records.
- The unreasonableness of agency determinations of whether a document is a public record or not.

See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161, 1171-74 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020); *Newspaper Holdings, Inc. v. New Castle Area School Dist.*, 911 A.2d 644, 650 (Pa. Commw. Ct. 2006).

52. Fulton County initially denied Plaintiff's records request by invoking two RTKL exemptions. *See* Exhibit D. However, in doing so, the County failed to identify the exempt records or explain why each identified document was exempt from disclosure, which violates its duties under the RTKL. *See UnitedHealthcare*, 187 A.3d at 1059.

53. After Plaintiffs appealed to the OOR, the County refused the OOR's request to produce an index of withheld documents, and effectively failed to comply with its duty to participate in the OOR's adjudication process. Finally, days after the deadline to appeal OOR's Final Order directing the County to produce all requested records, the County produced 691 records.

54. None of the produced records fit the exemptions the County relied on to withhold documents, suggesting that the County invoked these exemptions in bad faith, or based on an unreasonable interpretation of the RTKL.

55. Moreover, the County's production is plainly incomplete, in violation of its duty to comply with the OOR's Final Determination. *See* records identified in paragraphs 38 to 47, *supra*.

56. The County's production again failed to identify any withheld documents, or provide any reason for withholding them, in violation of its duties under the RTKL. *See UnitedHealthcare*, 187 A.3d at 1059.

57. Additionally, county officials' use of private email servers to conduct official business with Wake TSI – and the failure to turn over responsive records from such servers – suggests a willful attempt to deprive Plaintiffs of access to public records, in violation of Section 1304.

58. The records at issue relate to Fulton County's review of the 2020 election, which has attracted national attention. *See, e.g.*, Exhibit H. Fulton County is one of only a small number of government agencies nationwide that have undertaken 2020 election reviews, and the only one thus far in Pennsylvania that has completed such a review.

59. “[T]he objective of the RTKL ... is to empower citizens by affording them access to information concerning the activities of their government.” *Uniontown Newspapers*, 243 A.3d at 33 (citation omitted). The RTKL's “salutary purpose [is] promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials and make officials accountable for their actions.” *Id.* (Citation omitted). Fulton County's bad faith in first unjustifiably delaying any production and then making plainly incomplete production has frustrated that purpose.

60. Therefore, in addition to production of the responsive documents identified above, Plaintiffs are entitled to reimbursement of their legal costs for this enforcement action and the imposition of appropriate civil penalties.

V. CONCLUSION

61. For the reasons set forth above, Fulton County violated the provisions of the RTKL, and deprived Plaintiffs and the public of vital information about a secretive election review.

62. Further, Fulton County acted in bad faith by failing to comply with its obligations under the RTKL, and by relying on purported exemptions that were not based on a reasonable interpretation of the law.

63. Therefore, Plaintiffs are entitled to any and all relief available under the RTKL, including immediate access to the information and records requested from the County; reimbursement for their attorneys' fees and related costs; and an imposition of civil penalties against Fulton County.

64. Plaintiffs are also entitled to discovery. *See* Pa. R. Civ. P. 4001; Pa. R. Civ. P. 1091. Defendant's failure to comply with clear obligations under the RTKL, improper invocation of inapplicable exemptions, failure to produce an index of responsive documents requested by OOR, and the blatantly deficient production require Plaintiffs to conduct discovery to ascertain the universe of responsive documents and the full extent of Defendant's bad faith.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, Witold Walczak and the American Civil Liberties Union, respectfully request that this Honorable Court enter an Order providing the following relief:

1. Directing the Fulton County Open Records Officer to produce all documents responsive to Plaintiffs' July 16, 2021, RTKL request, as directed by the OOR's September 13, 2021, Final Determination, within seven (7) days of issuance of the Order of Court;
2. Permit Plaintiffs to engage in discovery in aid of executing this Court's Order, including but not limited to depositions of the Fulton County Open Records Officer and the Fulton County Commissioners.
3. Find that Fulton County acted in bad faith by depriving Plaintiffs of their right of access to public records, and by failing to satisfy its obligations under the Pennsylvania Right to Know Law;

4. Award Plaintiffs their attorneys' fees and costs incurred in this matter pursuant to Section 1304 of the Right to Know Law; and

5. Impose a \$1,500 civil penalty against Fulton County pursuant to Section 1305(a) of the Right to Know Law.

6. Provide any further relief that this Court deems appropriate under the circumstances.

Respectfully submitted,

Dated: January 4, 2022



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VERIFICATION

I verify that the statements made in this Complaint are true and correct to the best of my knowledge and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Dated: January 4, 2022

s/Marian K. Schneider
s/Connor P. Hayes

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2022, a true and correct copy of the Complaint in Mandamus with exhibits attached thereto enforcing the Final Determination of the Office of Open Records filed on behalf of the Plaintiffs, Witold Walczak and the American Civil Liberties Union of Pennsylvania, was delivered to the Fulton County Sheriff and Franklin County Sheriff for service upon the following individuals and entities:

Fulton County
Open Records Office
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