

Exhibit A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

WITOLD WALCZAK AND
THE AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA,
Requester

v.

FULTON COUNTY,
Respondent

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Docket No.: AP 2021-1661

INTRODUCTION

Witold Walczak, Esq., an attorney with the American Civil Liberties Union of Pennsylvania (collectively “Requester”), submitted a request (“Request”) to Fulton County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking all records relating to post-election audits or the funding thereof. The County denied the Request, arguing that the records are exempt because they relate to internal, predecisional deliberations or relate to noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On July 16, 2021, the Request was filed, seeking:

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.

On July 22, 2021, the County denied the Request, arguing that the responsive records are exempt because they would contain internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and relate to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On August 12, 2021, the Requester appealed to the OOR, challenging the denial and providing reasons for disclosure. The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 20, 2021, the Requester submitted a statement asking the OOR to issue a briefing schedule and require the production of specific evidence. The same day, the County submitted an unsworn position statement arguing that the records relate to an investigation the County was forced to undertake to litigate against the Acting Secretary of the Commonwealth, and that release of the records would jeopardize the County's ability to participate in that litigation.¹

On August 24, 2021, the Requester submitted a detailed position statement arguing that the County had failed to prove any exemption and that the exemptions were not facially applicable to the Request. The Requester again asked the OOR to issue an order requiring the County to provide more detailed evidence regarding the responsive records.

¹ The OOR asked the parties to respond to the motions for a briefing schedule, but the parties did not do so.

On August 25, 2021, the OOR denied the Requester's motion, noting that the County is responsible for organizing its own case on appeal. The OOR sought additional evidence from the County relating to the scope and nature of the noncriminal investigation and nature of the responsive records, but the County did not respond.

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.

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 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business

days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

The Request seeks all records relating to post-election audits carried out by the County, including discussions of funding for such efforts. The County denied the Request, arguing that it seeks internal, predecisional, and deliberative records, and records related to a noncriminal investigation.

Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents

are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

Meanwhile, Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [c]omplaints submitted to an agency... [and] investigative materials, notes, correspondence and reports” or a record that, if disclosed, would “[c]onstitute an unwarranted invasion of privacy.” 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(C). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *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. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In *Chawaga*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. 91 A.3d at 259. Pursuant to *Chawaga*, the OOR has noted that “[n]ot all agency fact-finding constitutes a ‘noncriminal investigation’ subject to the protections of the RTKL.” *Hopey v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1739, 2014 PA O.O.R.D. LEXIS 1318; *see also Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2014-1572, 2014 PA O.O.R.D. LEXIS 1338. Furthermore, the exempt records must be produced as a result of the agency’s own noncriminal investigations; an agency may not rely on the fact that it

has been investigated by another agency to withhold otherwise-public records. *See Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014) (“To the extent the documents reference and arguably ‘relate’ to a criminal investigation conducted by another agency, the records themselves do not contain any investigative material”); *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2014-1978, 2015 PA O.O.R.D. LEXIS 41 (An agency cannot rely on another agency’s investigation when claiming an investigative exemption under the RTKL).

Here, the County states that:

Fulton County OOR denied these requests because, as of the time of the requests, and continuing presently, the Acting Secretary for the Commonwealth of Pennsylvania has been involved with Fulton County in investigating and ultimately deciding to decertify some of the County’s voting equipment.

At the time of the [R]equest, the County was of the opinion that the Acting Secretary of the Commonwealth was conducting an investigation into the matter and thus the records were exempt from disclosure under 65 Pa.C.S. 67.708(b)(10)(i)(A) & (17). Now the Acting Secretary has actually attempted to “decertify” Fulton County voting equipment, and the County has initiated litigation in the Commonwealth Court to challenge that action. []

[] Fulton County denied the [R]equest because, based on the actions and investigation being conducted by the Acting Secretary of the Commonwealth, Fulton County has had to conduct its own investigation into all matters surrounding the Wake TSI assessment. This investigation has resulted in the litigation referenced above. The release of the requested information could jeopardize the County’s ability to meaningfully participate in said litigation.²

The County’s position suffers from several fatal flaws. First, as noted above, the investigative exemptions in the RTKL are intended to secure the confidentiality of an agency’s own investigations, not protect an agency’s records from public scrutiny because that agency was

² The fact that a government agency is a party to a lawsuit has no significance under the RTKL, unless the judge in that case has issued an order which expressly bars dissemination of the responsive records. *Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1139 (Pa. Commw. Ct. 2017) (“Discovery conducted in a court of law and a request made under the RTKL are wholly separate processes and it is only in rare circumstances, such as the issuance of a protective order, that a judicial order or decree governing discovery in litigation will act to prevent disclosure of public information responsive to a RTKL request.”).

investigated. *See Hayes v. Pa. Dep't of Pub. Welf.*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530 (“[A] review of case law interpreting the RTKL and its predecessor statute indicates that the investigative exemption has only been extended to protect the records of the agency carrying out an investigation”). The County is not entitled to withhold otherwise-public records simply because they were reviewed by the Acting Secretary of the Commonwealth.

Next, the County does not identify any of the responsive records, including the records which it withheld pursuant to Section 708(b)(10)(i)(A). Given the subject matter of the Request, it is possible that there might be internal, predecisional, deliberative material among the responsive records. However, because the County has chosen not to identify any of the responsive records, the OOR is unable to determine which records, if any, would qualify. *See Fitzgerald v. Pa. Dep't of Corr.*, OOR Dkt. AP 2016-2075, 2016 PA O.O.R.D. LEXIS 56 (“In the vast majority of cases, the RTKL’s requirement that an agency demonstrate that a record is exempt from disclosure before withholding it means that the agency must provide (1) an acknowledgement that the records exist, (2) a description of the records, and (3) an analysis of why the records are exempt.”) In this case, the County has neither explained what records have been withheld nor furnished any evidence that such records qualify for the exemptions raised.

Finally, the County did not submit any evidence to establish the nature or scope of the noncriminal investigation which it has undertaken. The agency bears the burden of proof in appeals under the RTKL. *See* 65 P.S. § 67.708(b). Although failure to submit evidence in response to an RTKL appeal is not necessarily a cause for default judgment, as the OOR must also consider the context and contents of the appeal filing itself, in most cases, the exemptions are not facially obvious. *Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions);

see also *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Here, although the Request seeks records which “relate” to one or more audits conducted by the County, the County has not demonstrated the statutory authority under which the audits were conducted, has not proven that it conducted “a systematic or searching inquiry, a detailed examination, or an official probe”, and has not demonstrated that all potentially responsive records relate to any such investigation. See, e.g., *Bauman v. Pa. Dep’t of State*, OOR Dkt. AP 2020-1330, 2020 PA O.O.R.D. LEXIS 2930 (finding (b)(17) applicable without an attestation because the request sought investigative records from a specified investigation conducted under an identified statute).

The County did not respond to either the Requester’s arguments regarding the sufficiency of its evidence or the OOR’s requests for additional evidence, and “it is not incumbent upon [the] OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (*en banc*). Unsworn statements or statements of counsel, such as the County’s submissions, not supported by affidavit testimony, have been held not to be competent evidence under the RTKL. See *Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (“Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the evidentiary record”) (citations omitted). Because 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.

The OOR notes that regardless of an agency's involvement in litigation, the agency cannot ignore its duties and responsibilities under the RTKL. Good faith is a common thread throughout the RTKL process; as noted by the Pennsylvania Supreme Court in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*:

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), *affirmed by*, 243 A.3d 19 (Pa. 2020). Furthermore, good faith involvement in the RTKL process includes presenting evidence and argument to the OOR. Failure to do so has resulted in the waiver of an agency or third party's ability to present additional evidence before a reviewing court. *See Voltz*, 163 A.3d at 491 ("Critically, Highmark offers no explanation for not submitting the evidence comprised in its request to supplement the record when it had the chance to do so before OOR. Therefore, we decline to review the additional evidence as factfinder, or to remand to OOR to open the record to accept this evidence. To allow a remand under these circumstances amounts to giving Highmark the proverbial second bite at the apple").

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to produce all responsive records within thirty 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 Fulton 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 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 13, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Witold Walczak, Esq. (via email);
Charles Kelly, Esq. (via email);
John Dixon, Esq. (via email);
James Stein, Esq. (via email)

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

Exhibit B



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

July 20, 2021

Mr. James M. Stein
Dick, Stein, Schemel, Wine & Frey
119 North Second Street
McConnellsburg, PA 17233

Dear Mr. Stein,

We are in receipt of your letter of June 29, 2021, written on behalf of Patti Hess and the Fulton County Board of Elections. Based on our discussions and correspondence with Fulton County officials, it appears that the contents of ballot boxes, including the voted ballots, and the components of the Dominion Democracy Suite 5.5A that were used during the 2020 November election were subjected to a post-election review by a third-party in violation of Pennsylvania's Election Code.

Pennsylvania's Election Code vests in each bipartisan county board of elections the authority and duty to maintain proper chain of custody of official ballots, balloting materials and voting systems before, during, and after each election. These requirements ensure that any official tabulation, recount, or election contest is conducted transparently in a manner that does not put at risk this critical election infrastructure.

The Department of State takes steps prior to the certification of a voting system to verify that the system successfully completes penetration testing, access control testing and vulnerability testing to ensure that every access point and all software and firmware is protected from tampering. Once a system is certified, the voting system vendor is then permitted to supply the voting system and counties are permitted to procure that system for use in Commonwealth elections, subject to the conditions of the Secretary of the Commonwealth's certification report.

Following delivery of a certified and procured system, the county is supposed to independently perform acceptance testing on the system. Thereafter, the equipment and software are expected to remain under the full control of the county.

As you have confirmed through our correspondence, Fulton County officials allowed Wake TSI, a company with no knowledge or expertise in election technology access to certain key components of its certified system. Fulton County officials permitted Wake TSI employees to access their "election database, results files, and Windows system logs." Further, the county allowed this third-party entity to use some type of "system imaging tool to take complete hard drive images of these computers" and "complete images of two USB thumb drives" used to transfer results files from their voting system computers to the computers used to upload results to the

state's voter registration and election results reporting system. These actions were taken in a manner that was not transparent or bipartisan.

As a result of the access granted to Wake TSI, Fulton County's certified system has been compromised and neither Fulton County; the vendor, Dominion Voting Systems; nor the Department of State can verify that the impacted components of Fulton County's leased voting system are safe to use in future elections.

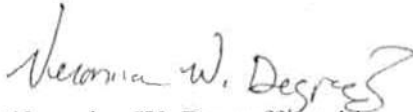
Due to these actions and after careful consideration, under the authority granted to the Secretary of Commonwealth under Sections 1101-A through 1122-A of the Pennsylvania Election Code, I have no other choice but to decertify the use of Fulton County's leased Dominion Democracy Suite 5.5A voting system last used in the November 2020 election.

Please know that I did not arrive at this decision lightly. I have a statutory obligation to examine, evaluate and certify electronic voting systems. These reviews include verifying that the voting system conforms to federal and state law and any regulations or standards regarding confidentiality, security, accuracy, safety, reliability, usability, accessibility, durability, resiliency, and auditability. I am also mindful of my federal obligations under Executive Order 13636, which focuses on measures required for infrastructure security and the action taken by the United States Department of Homeland Security to designate elections as critical infrastructure under the "Government Facilities" sector.

Please know that Department stands ready to support you in any appropriate manner.

If you have any questions, do not hesitate to reach out to my office directly.

Sincerely,



Veronica W. Degraffenreid
Acting Secretary of the Commonwealth

Cc: Fulton County Board of Elections

Exhibit C



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Fulton County Board of Commissioners (Attn: AORO)

Date of Request: July 16, 2021 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Witold Walczak Company (if applicable): ACLU of Pennsylvania

Mailing Address: P.O. Box 23058

City: Pittsburgh State: PA Zip: 15222 Email: vwalczak@aclupa.org

Telephone: 412-681-7736 x 321 Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

Any record, as that term is defined in 65 P.S. § 67.102, 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.

DO YOU WANT COPIES? ☐ Yes, printed copies (default if none are checked)
☒ Yes, electronic copies preferred if available
☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☒ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☒ **\$100 (or)** ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

*NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>*

Form updated Feb. 3, 2020

Exhibit D



Fulton County Commissioners

116 West Market Street, Suite 203, McConnellsburg, PA 17233

Telephone: (717) 485-3691 Fax: (717) 485-9411 Email: commissioners@co.fulton.pa.us

Stuart L. Ulsh, Chair
Randy H. Bunch, Vice-Chair
Paula J. Shives

Lisa Mellott-McConahy, Chief Clerk
Jim Stein, County Solicitor

July 22, 2021

Witold Walczak
PO Box 23058
Pittsburgh, PA 15222
vwalczak@aclupa.org

RE: Right-to-Know Law Request

Dear Witold:

I received your RTK 7/16/21. Below is the information provided by our County Solicitor, James Stein denying your request.

Your request is denied pursuant to Section 708(b)(17), records of an agency relating to non-criminal investigations are exempt from disclosure. These records include investigative materials and records that if disclosed, would reveal the institution or progress of an agency investigation.

Further, your request is denied to the extent that it seeks records of the Department that reflect the internal, pre-decisional deliberations between agencies, or research, memos and other documents used in the internal, pre-decisional deliberations by and between agencies under § 67.708(b)(10)(i)(A).

This Correspondence will serve to close your request.

Sincerely,

Lisa Mellott-McConahy
Open Records Officer
County of Fulton

Exhibit E



From: Patti Hess
Sent: Tuesday, May 25, 2021 1:09 PM
To: Matt Shuham; Lisa Mellott-McConahy
Cc: Elections Director
Subject: RE: Comment request re: Document showing Wake TSI audit was contracted by Sidney Powell's group

Yes, it belongs to Gene Kern.

Patti

Patti K. Hess
CDBG COORDINATOR
COMMUNITY DEVELOPMENT COORDINATOR
DIRECTOR OF ELECTIONS & VOTER REG.

COUNTY OF FULTON
116 WEST MARKET STREET, SUITE 205
MCCONNELLSBURG PA 17233
DIRECT LINE: 717-485-6864

NOTICE: This confidential message/attachment contains information intended for a specific individual(s) and purpose. Any inappropriate use, distribution or copying is strictly prohibited. If received in error, notify the sender and immediately delete the message.

From: Matt Shuham [<mailto:mshuham@talkingpointsmemo.com>]
Sent: Tuesday, May 25, 2021 12:11 PM
To: Lisa Mellott-McConahy <lmccconahy@co.fulton.pa.us>
Cc: Elections Director <electionsdirector@co.fulton.pa.us>
Subject: Re: Comment request re: Document showing Wake TSI audit was contracted by Sidney Powell's group

Got it, thank you for clarifying.

So Patti Hess (I've cc'ed the election department because we're speaking about them) confirmed that the signature/handwritten note belonged to Gene Kern?

Best,
Matt Shuham
Reporter, Talking Points Memo
mshuham@talkingpointsmemo.com
mattshuham@protonmail.com
646-738-4485 (office) / 646-397-4678 (cell, Signal)

On Tue, May 25, 2021 at 12:06 PM Lisa Mellott-McConahy <lmccconahy@co.fulton.pa.us> wrote:

That was documentation that Patti Hess, our elections director had from the WAKE visit and was a response to a RTK Request yesterday. She verified the signature when I asked her. I was not here for any of the WAKE Visits and cannot confirm anything as I WAS NOT PRESENT! As the Right-To-Know Officer, I forward the requests to the departments that the requests pertain to and send what is provided to me.

From: Matt Shuham <mshuham@talkingpointsmemo.com>

Sent: Tuesday, May 25, 2021 11:40 AM

To: Lisa Mellott-McConahy <lmccconahy@co.fulton.pa.us>; Commissioners <commissioners@co.fulton.pa.us>

Subject: Comment request re: Document showing Wake TSI audit was contracted by Sidney Powell's group

Hello,

Talking Points Memo is reporting a Fulton County document published by the Arizona Mirror Monday, which shows that Defending the Republic contracted Wake TSI to audit Fulton County's 2020 vote:

<https://www.azmirror.com/2021/05/24/group-led-by-kraken-lawyer-sidney-powell-hired-the-firm-recounting-azs-election-to-probe-a-pa-election/>

It reports specifically, referring to handwriting on a document embedded in the story, "County clerk Lisa Mellott-McConahy identified the handwriting as belonging to Kern."

Can you confirm that is the case? Were there more pages to this document or was it just one page? And, how did Defending the Republic become involved in this audit? Can TPM have a copy for our reporting? What was the total cost of the audit as paid to Wake TSI? Any other context our readers should know about this document, or about the audit in general?

Thank you very much,

Matt Shuham

Reporter, Talking Points Memo

mshuham@talkingpointsmemo.com

mattshuham@protonmail.com

646-738-4485 (office) / 646-397-4678 (cell, Signal)

Exhibit F

From: Stuart Ulsh
Sent: Wednesday, February 10, 2021 10:39 AM
To: Gene Kern
Subject: Re: Personal email addresses

fmsexcavating@comcast.net

On Feb 10, 2021 9:04 AM, Gene Kern <gkern@waketsi.com> wrote:
Hi Gentlemen

Would you please share a personal email address with me?

Gene Kern
EVP
(610) 291-0133

Exhibit G

Meeting with Dominion

April 20, 2021

Fulton County Commissioners Office

Attendance: Stuart Ulsh, Randy Bunch, Paula Shives, Lisa McConahy, Lisa Beatty, Senator Judy Ward, Representative Jesse Topper, Jim Stein, Eldon Martin, Frank Dutton, John Hastings, Kay Stimson, Patti Hess.

Kay referring to the letter sent by her and is attached. The question is about the upcoming election and how to move forward.

Dominion will not back the Central Scanning machines from them since, Wake TSI came in and did an audit. The County was asked by government officials like Judy Ward, Doug Mastriano and others to let Wake come in and do the audit. Dominion states that Wake is not a federal accredited auditing company that is state approved and do not know what they could have done to the machines since no report is back yet. We stated that Wake did not touch the equipment that everything that was done was done by Eldon. The only thing is that Wake gave Eldon a USB Stick to download information on. Eldon downloads information to keep for the county on different USB Sticks after each election.

Short term goal is to bring in Loaner equipment to use for the May 18, 2021 primary election. These are to be approved by the state and set up by dominion. Since Dominion states that the state needs to approve what Dominion is supposed to put in to calculate the machines to be adequate for the election, Jesse and Judy said they would work with the state to get this process approved ASAP.

Dominion states chain of custody of the machines is information goes to the state and they approve the software not the hardware and dominion makes sure it is what is downloaded in the machines.

L & A Testing needs to be done before elections and paperwork from us that we use and from Dominion should be kept to prove everything is working and done properly. Dominion states that they do not keep any copies of this information, that they only give the customer the information. Stuart stated that they as a company should be keeping copies of any information that is given to their customers and it's hard to believe that a company like them working with all the states with voting would not keep copies of all the information. Dominion stated the do not keep copies.

The equipment that is here at Fulton County will remain here until this situation is resolved with Dominion. Eldon has already done a backup of the equipment here.

Kay said she will get with Jonathan Marks and the acting secretary Veronica, from the state to work with them on the loaner equipment.

Jim said that everyone is on the same page to get everything done for this election.

Jim stated that we will discuss the cost at another time and Jesse and Judy said that they would see about getting help to cover things.

Jim stated that when the report from Wake that Dominion is requesting is received we will be making it public and make sure Dominion sees it.

Fulton County is to make sure that only federal accredited companies do audits from here on out and a list is to be on the State web site and Dominion said they will make sure we get a copy.

Judy stated that the audit was done to make sure the voters know that everything was up and up with the election and Stuart said that we know that on our part that we have nothing to hide that is why the audit was done to show that everything was done right. Randy said everything in our November was done by the book and when the audit was done we were told everything went well and no problems were found.

Stuart again asked about the attestation and John said that they do not have to do it and have not done it with any county and do not have copy of it or anything else and that Fulton County should have something.

John stated to call the previous Director of Elections and see where the information could be since they gave it to the county.

Dominion to have equipment here to use by next week and L & A testing will be the following week May 10, 2021 at 9:30 am.

Exhibit H

‘It was like this rogue thing’: How the push by Trump allies to undermine the 2020 results through ballot reviews started quietly in Pennsylvania

By Rosalind S. Helderman

June 6, 2021 at 6:00 p.m. EDT



Joe Biden’s presidential victory in Pennsylvania had been certified for weeks when officials in some Republican-leaning counties began receiving strange phone calls from GOP state senators in late December.

The lawmakers, who had been publicly questioning Biden’s win, had a request: Would the counties agree to a voluntary audit of their ballots?

The push to conduct unofficial election audits in multiple counties, described in interviews and emails obtained by The Washington Post, served as a last-ditch effort by allies of former president Donald Trump to undercut Biden’s win after failing in the courts and the state legislature.

The previously unreported lobbying foreshadowed a playbook now in use in Arizona and increasingly being sought in other communities across the country as Trump supporters clamor for reviews of the ballots cast last fall, citing false claims that the vote was corrupted by fraud. The former president’s backers argue that any evidence of problems they can uncover will prove the election system is vulnerable — and could have been manipulated to help Biden win.

The audits are being pushed by a loose affiliation of GOP lawmakers, lawyers and self-described election experts, backed by private fundraising campaigns whose donors are unknown.

In Pennsylvania, the state senators quietly targeted at least three small counties, all of which Trump had won handily. Their proposal was unorthodox: to have a private company scrutinize the county’s ballots, for free — a move outside the official processes used for election challenges.

Only one county is known to have agreed to the senators’ request: rural Fulton County, on the Maryland border, where Trump performed better than anywhere else in the state, winning nearly 86 percent of the roughly 8,000 votes cast.

“I think they thought this was just a small, friendly area. If they could get away with it, they could raise questions about the legitimacy of the election,” said Dayton Tweedy, 60, a teacher in Fulton who, with his wife, Kimbra, spent months trying to learn more about how the audit was conducted in his community — and why.

On Dec. 31, in the quiet of the winter holiday, county officials allowed a West Chester, Pa., company called Wake TSI to spend an afternoon recounting about 1,000 mail-in ballots and taking data from county voting machines.

According to a county document obtained by The Post, Wake TSI was “contracted” to a nonprofit group run by Sidney Powell, a pro-Trump lawyer who was in the midst of filing a flurry of lawsuits around the country challenging the election results.

Wake TSI submitted a draft report in February to Fulton officials declaring the election had been “well run” and “conducted in a diligent and effective manner,” county documents show.

However, before the final version was posted to the county website, it was revised. The new version included a caveat to the county’s otherwise clean bill of health: “This does not indicate that there were no issues with the election, just that they were not the fault of the County Election Commission or County Election Director,” it read, before flagging potential problems with the county voting machines and other aspects of the election.

The report has been circulated on social media by Trump allies who have sought to claim that voting machines are vulnerable to hacking and fraud.

County officials did not respond to requests for comment on who made the changes to the report. Wake TSI and Powell did not respond to requests for comment.

The early attempt to launch off-the-books audits in Pennsylvania counties shows the relentlessness of the campaign by Trump's allies to overturn the election — an assault that began before the polls closed and has only expanded in the months since a pro-Trump mob attacked the U.S. Capitol, trying to prevent Biden's win from being formalized.

The full scope of the endeavor to undermine the 2020 results is still coming into public view. On Friday, newly released emails revealed that Trump called the Republican president of the Arizona Senate late last year to thank her for trying to prove fraud in her state. Around the same time frame, White House Chief of Staff Mark Meadows was pressuring the Justice Department to investigate unfounded claims about vulnerabilities in the election, the New York Times first reported Saturday.

At a conference in Texas last weekend, Powell said she still believes Trump should be “reinstated” as president, an idea that has also transfixed the former president.

One of the Pennsylvania state senators who pushed for the county audits, Republican Doug Mastriano, told Trump at a one-on-one meeting in New York last month that he could engineer an audit in his state, according to a person familiar with the meeting, who spoke the condition of anonymity to describe the private discussion. Mastriano did not respond to requests for comment.

Wake TSI has played a key role in the audit of the Maricopa County, Ariz., ballots — hired as a subcontractor to handle the hand recount portion of the process.

Last week, Mastriano and other Pennsylvania lawmakers toured the site in Phoenix where the recount is underway. He told a Wall Street Journal reporter that he believed a similar audit should be initiated in Pennsylvania.

“For the sake . . . of our constitutional republic, and for the sake of people's peace of mind, let's just do it,” he said. “Let's pick a few counties and put people's minds at rest.”

On Friday, Trump issued a statement praising Mastriano for leading the trip to Arizona and calling on the Pennsylvania Senate to heed his call.

The former president added: “The people of Pennsylvania and America deserve to know the truth.”

A key state swings for Biden

The senators' request to audit county results in Pennsylvania came at the end of nearly two months of tumult in the Keystone State that followed the Nov. 3 election.

Early returns on election night showed Trump ahead in the state that had helped him win the White House in 2016. But a Pennsylvania law that Republicans resisted changing barred counties from opening more than 2.5 million mail-in ballots until Election Day. As a result, it took days to tally all the votes, particularly in Democratic strongholds of Philadelphia and Pittsburgh, where many Biden supporters had voted by mail to avoid visiting polls during the coronavirus pandemic.

As the votes were counted, Biden closed Trump's lead and then pulled ahead — a phenomenon that political experts had predicted would occur. Four days after the election, major news organizations declared Biden the winner of Pennsylvania's 20 electoral votes. On Nov. 24, Pennsylvania Secretary of State Kathy Boockvar (D) formally certified Biden's victory by a margin of over 80,000 votes.

But the slow count offered Trump an opening. On Nov. 7, his personal attorney Rudolph W. Giuliani and other allies held a freewheeling news conference in the parking lot of a Philadelphia landscaping business. Giuliani declared the election was being stolen from Trump in the city, which he said had "a sad history of voter fraud."

Giuliani later personally appeared in court for the first time in nearly three decades to argue to a federal judge that he should disqualify about 680,000 votes cast in Philadelphia and Pittsburgh because, Giuliani claimed, Republican

observers had not been given sufficient ability to watch the count.

The judge rejected the suit, comparing the legal theories stitched together by Trump's campaign to "Frankenstein's monster." On appeal, a three-judge panel — all of them appointed by Republicans — also rejected the challenge to Pennsylvania's vote. "Charges of unfairness are serious. But calling an election unfair does not make it so," U.S. Circuit Judge Stephanos Bibas, a Trump appointee, wrote for the group.

Even so, Trump's complaints found fertile ground in Pennsylvania's Republican-led General Assembly.

Mastriano, a retired Army colonel elected to the Senate in 2019 from rural Franklin County, was at the vanguard. Three days after the election, he called for a recount in any precinct where "questionable actions were demonstrated."

On Nov. 25, Mastriano and other Senate Republicans organized a public hearing to air Giuliani's claims of fraud in a hotel ballroom in Gettysburg. Trump planned to attend but canceled at the last minute, instead calling in to the meeting by cellphone. "We have to turn the election over," he said, as Trump lawyer Jenna Ellis held up a phone to the microphone for the room to hear.

Afterward, Mastriano and others in the group piled into vans and cars and drove to Washington, where they met in the Oval Office with Trump, according to people familiar with the meeting. (Mastriano was forced to abruptly leave after the coronavirus test he took when he arrived at the White House came back positive.)

Two days later, Mastriano introduced a resolution asking that the certification of Biden's win be withdrawn and the state legislature be allowed to appoint its own electors instead.

He has told reporters that he and Trump grew close in these weeks, speaking at least 15 times by telephone. As Trump continued to push to overturn the election, the Associated Press reported that Mastriano forwarded an invitation to Pennsylvania Senate Republicans to attend a White House luncheon with Trump on Dec. 23 — what would be his second meeting with the president in less than a month.

Queries to counties

As December grew to a close, Trump had few options left in Pennsylvania.

A legislative committee in the state had rejected a resolution to conduct an immediate audit of election results statewide, and the legislative session expired without consideration of Mastriano's proposal to appoint electors.

Days before Congress was scheduled to finalize Biden's win in Washington on Jan. 6, the elections director of Cumberland County, a Republican-leaning area on the outskirts of Harrisburg, emailed her counterparts around the state.

"Did anyone else get a request from Senator Judy Ward about auditing your voting machines?" she wrote on Dec. 30, according to a copy of the message obtained by The Post.

Ward, a Republican state senator who took office in 2019, is an ally of Mastriano and shared the dais with him at the Gettysburg hearing.

A clerk in tiny Jefferson County, 150 miles away, responded: "Jefferson received a similar request but ours was from Senator Elect Cris Dush."

Fulton County elections director Patti Hess replied simply: "Yes."

In Cumberland, the request was received with wariness.

Vince DiFilippo, one of the county's two Republican commissioners, said in an interview that Ward called him personally and asked whether Cumberland would be willing to participate in a "voluntary" audit.

Trump won Cumberland County by nearly 11 points, a hefty margin, though smaller than his 18-point victory in 2016. But DiFilippo said the results made sense to him given Trump's eroding suburban support, noting that other Republicans who shared the ballot with Trump had done well in the county.

DiFilippo said he told Ward that he didn't think an audit was necessary, but he promised to discuss the request with Cumberland's other two commissioners.

Jean Foschi, the county's Democratic commissioner, said in an interview that she was confused and dismayed by the request, particularly because the state already conducted formal routine election reviews.

"It was like this rogue thing," she said. "Those election machines are state and federally certified. Why would we let a private company come in and mess around with them?"

Gary Eichelberger, the Republican chairman of the commission, said in an email to The Post that he felt "such requests need to be brought to the board openly and not back-doored."

The commissioners said they informed Ward that if she wanted to request an audit, she should make a formal and public inquiry for them to consider. She never followed up, they said.

"Maybe the Trump faction was trying to prove a point or prove what they felt was maybe some voter fraud," DiFilippo said. "I can't speak for other counties, but it sure as hell didn't happen in Cumberland County."

Ward did not respond to requests for comment, nor did Dush, who requested the audit in Jefferson County.

It is not clear how many counties fielded the requests for voluntary election audits. A spokeswoman for acting secretary of the commonwealth Veronica Degraffenreid, the state's top election official, said her office is not aware of any county other than Fulton agreeing to participate.

Fulton officials did not respond to multiple requests for comment about why they let the audit proceed. But in a letter she submitted to Degraffenreid last month describing the process, Hess, the county election chief, said the audit had been requested by "various members of the Pennsylvania legislature."

"Since we believe in transparency, we agreed to let them come in and do the audit," she wrote, according to a copy of the letter obtained by The Post. Hess added that she was with the ballots at all times and the county's IT director stayed with the machines.

One of the county's three commissioners — Republican Randy Bunch — was present as well, she wrote, moving back and forth between two rooms where the audit was being conducted.

In her letter, Hess also noted that Wake officials had signed a document promising not to "disturb or manipulate any equipment."

The Dec. 31 document included a handwritten notation at the bottom that stated that the audit was "set" by Mastriano and Wake was "contracted to Defending the Republic," according to a copy obtained by The Post. Hess told The Post in an email Friday that the document was submitted to her by Wake founder Gene Kern after she asked him to specify who sent him to the county. Kern did not respond to a request for comment.

Defending the Republic is a group founded by Powell, according to its website, which has raised money to support the legal challenges she filed against the election results. Wake's link to Powell and Mastriano's role was first reported by the Arizona Mirror.

A community in the dark

The residents of Fulton County initially had no idea that their ballots had been scrutinized.

The first indication came during a Jan. 5 meeting of the county commissioners, five days after the audit.

Minutes from the meeting show that the three commissioners had discussed a request by a "Third Party Analysis Team" to examine the 2020 presidential results on Dec. 29. At the time, Democratic Commissioner Paula Shives said she would agree only if the voting machines were not removed from county offices and if she could be present for the review, according to the minutes.

There had been no vote taken, the minutes show, but the inspection had been allowed to proceed anyway — without Shives's knowledge or attendance.

Shives did not respond to requests for comment.

The following week, commissioners discussed the Wake audit again, minutes show. This time, commissioners took a formal vote to give the company new access to the county's absentee ballots. Bunch — who was well known locally for commissioning an eight-foot-high mural of Trump along the main road in the county seat of McConnellsburg — voted in favor. So did commission chairman Stuart Ulsh. Shives voted in opposition, insisting "anyone wanting to review election materials should go through the legal process and obtain a subpoena."

The dust-up led to a short story in the Fulton County News.

The Tweedys, the local couple, read the piece with puzzlement. Both had previously helped run county elections — Kimbra, 59, as an elected inspector and Dayton as a clerk. They said they believed Fulton's elections were secure and well administered.

On Jan. 21, Kimbra Tweedy submitted a letter to the commissioners with a list of questions. "Exactly who made the initial decision to contact Wake Technology Services?" she wrote. "If there were no discrepancies, what is the reason for auditing the mail-in ballots? What costs would be associated with this audit, and who would pay them?"

In response, the couple said they were invited to a public meeting where Ulsh explained that there had been no

discrepancies reported in the county's vote, but that the audit had been requested by Ward and Mastriano and had been free to the county.

"We asked, 'What was the rationale?'" Dayton Tweedy said. "He just said, 'Transparency.'"

"I was in there during the last presidential election, and they never audited it. Suddenly, they're auditing this election," Kimbra Tweedy said. "It just seemed to me, why are they auditing it, when they overwhelmingly certified it?"

'It's not right'

As Fulton County contended with public questions about the audit, the consequences of Trump's attacks on the integrity of the election were on stark display.

On Jan. 6, a mob of his supporters stormed the U.S. Capitol in an attempt to stop Congress from formally certifying Biden's win. Bunch, the Fulton commissioner who had been present for the ballot review, attended rallies in Washington that day, according to photos he posted on Facebook. None shows him inside the building.

Mastriano was also in Washington — he posted a note on Facebook offering bus tickets to bring people to D.C. for the event, local media reported at the time. Recent videos have emerged that show him walking in a crowd as a man removes a bike rack blocking a sidewalk. Mastriano has said that he respected police lines and that he and his wife departed when it became clear the event was no longer peaceful.

Late that night, after the marauders were cleared from the building, dozens of GOP lawmakers still voted to challenge the final electoral college vote in Pennsylvania and Arizona.

Two months later, the Republican president of the Arizona Senate announced that she had hired a group of companies to conduct a new audit and recount of the presidential vote in Maricopa County, the state's largest jurisdiction.

Among them: Wake TSI, which cited its experience conducting a hand recount in Fulton County, Pa.

Hess, the Fulton County elections director, told The Post in April that the company's employees had been "very nice and professional" but that no report had been released of their findings.

Documents obtained by The Post, however, show that the company submitted a 74-page draft report to Ulsh, the chairman of the county commissioners, on Feb. 22.

That report concluded that the county had "no anomalous or unusual incidents reported during the election process" and that the election was "well run, followed all Commonwealth and Federal guidelines, and was conducted in a diligent and effective manner."

The draft identified two "issues of note," neither affecting results. In two places, the draft identified the person who had requested the audit in Fulton as "Pennsylvania State Senator Marsicano" — an apparent misspelling of Mastriano.

In May, the county quietly posted a final version of the report to its website. This version indicated that Mastriano and Ward had been “aware” of the audit but omitted that they had requested it. New warnings of possible problems had been added. Instead of just two “issues of note,” the final report cited five — including three related to Dominion Voting Systems, an election machine company that has been the target of unfounded conspiracy theories by Trump’s supporters since November.

“While these may seem minor the impact on an election can be huge,” read the final report, another line not found in the draft.

County officials and Wake did not respond to questions about why the draft was rewritten. A Dominion spokeswoman declined to comment.

Patrick Byrne, the former chairman of Overstock.com, seized on the report, sharing it on Telegram with Trump supporters fervently monitoring the Arizona audit. Byrne, who has been raising money to fund private election audits, had met with Trump and Powell in the Oval Office in late December to discuss potentially using the military to seize voting machines for analysis, as The Post previously reported.

Last month, Wake ended its involvement with the Arizona recount. An audit spokesman said that the company’s contract there ended in mid-May, but that the techniques it had developed are still in use.

In Fulton, county officials may now have to pay to replace all of their voting machines, a pricey consequence of turning them over to be handled by an uncertified company that Arizona officials are weighing, as well.

For their part, Dayton and Kimbra Tweedy said they were glad they rang alarm bells about the election audit — but saddened that their community might have been used in some kind of plan to undermine the vote.

“Democracy is democracy, and the rule of law is the rule of law,” Dayton Tweedy said. “It’s not right for anyone to be questioning the legitimacy of the election without any kind of evidence — or even evidence to the contrary.”

Josh Dawsey, Alice Crites and Amy Gardner contributed to this report.