

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MATTHEW ALLEN VAN BIBBER,

Plaintiff,

v.

ALLEGHENY COUNTY & ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Defendants.

: **CIVIL DIVISION**

:

:

: Docket No.

:

: **BRIEF IN SUPPORT OF**
: **EMERGENCY MOTION FOR**
: **PRELIMINARY INJUNCTION**

:

: Filed on behalf of Plaintiff,
: Matthew Allen Van Bibber

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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MATTHEW ALLEN VAN BIBBER,	:	CIVIL DIVISION
	:	
Plaintiff,	:	
	:	Docket No.
v.	:	
	:	
ALLEGHENY COUNTY & ALLEGHENY	:	
COUNTY BOARD OF ELECTIONS,	:	
	:	
Defendants.	:	

BRIEF IN SUPPORT OF EMERGENCY PRELIMINARY INJUNCTION

Plaintiff Matthew Van Bibber (“Mr. Van Bibber”), by and through his undersigned attorneys, files this Brief in Support of Emergency Motion for Preliminary Injunction, stating as follows:

BACKGROUND

The case concerns election-related documentation and information that is in the custody and possession of Defendant Allegheny County (“the County”) and/or Defendant Allegheny County Board of Elections (“the BoE”), particularly documentation and information to which Mr. Van Bibber has a statutory right to access, inspect, and photocopy.

By directive issued by the Pennsylvania Department of State (“State Department”), counties are required to perform Logic & Accuracy testing (“L and A testing” or “L & A testing”) of their voting machines prior to an election. See Exhibit A to Complaint. According to the State Department, “L&A testing is a series of pre-election steps intended to ensure that ballots, scanners, ballot-marking devices, and all components of a county’s certified voting system are properly configured and in good working order prior to being used in an election.” Exhibit A to Complaint.

On September 24, 2024, Mr. Van Bibber sent an e-mail request for documents, records, and/or reports to the County's Election Division Deputy Manager, Chet Harhut ("Mr. Harhut"), seeking, in pertinent part, the following information regarding the County's L & A testing of the voting machines:

Please provide the following data for the 2024 General Election L and A testing, as soon as possible and before the election.

*ALL digital Images and CVR files, from ALL machines tested, for all ballot types.

*Please also including all digital images and cvrs that were scanned on the spare/backup machines.

*ALL Scytl export files for the 2024 General L and A test.

*Please provide all reports for the following DS200s. Configuration report, voting results report, zero report

0319330363

0319372558

0319330348

*Please list the serial numbers of the spare/backup machines for this election.

*Please provide all reports for the spare/backup machines. Configuration, voting results, zero report

*Please let me know approx. cost for copies of reports.

*Were the mail-in ballots scanned?

*Were the absentee ballots scanned?

*I would also like to review the video footage for the testing [in person inspect].

Exhibit B to Complaint. Nothing that Mr. Van Bidder requested was in any way nonpublic or confidential.

Having received no response from the County or BoE, Mr. Van Bibber sent a follow-up e-mail to Mr. Harhut on October 7, 2024, stating, in relevant part: "Hi Chet, Following up on below email, didn't see a response. I [would] like to review these before election day." Exhibit B to

Complaint. On October 21, 2024, Mr. Van Bibber sent another follow-up e-mail to David Voye and the BoE, forwarding his prior request and follow-up e-mail, and wrote: “Can you get me the below [records, documents, or reports]. No response in weeks... Like to get this reviewed before election.” Exhibit B to Complaint.

On October 22, 2024, twenty-eight days after Mr. Van Bibber filed his initial September 24, 2024 request for documents or records to Mr. Harhut, the County’s Open Records Office replied as follows:

Please be advised that the County is invoking its right under Section 902 of the RTKL for an extension of time to complete a review of your request and to issue a final response for the following reason:

Section 902 (a) (3) – A timely response to the request for access cannot be accomplished due to bona fide and specified staffing limitations. Limited staff requires the need for additional time.

By law, the Allegheny County Open Records Office has 30 days to issue a final response regarding this request. A response is expected to be provided within 30 days of this date of this letter.

Exhibit B to Complaint.

On October 24, 2024, Mr. Van Bibber, referencing and including his previous request and follow-up e-mails, contacted a solicitor for the County, Mr. Alan Opsitnick (“Attorney Opsitnick”), and stated:

Hi Allan,

I wanted to follow up on below asks, as this is all standard stuff that I have asked for in past for L and A testing and Non-L and A testing and this was all provided in past. Also, I had a RTK[L] in past where I was approved to see video footage, as we discussed after board meeting. I sent this out not to[o] long after the L and A testing and only requested a few simple things because I know people are probably busy. I requested things that should of [sic have] been very easy to get to at that time and to provide. There are a few simple questions below that should be able to be answered right away as well. I would like to get this information for review soon to make sure things are in proper working order, as in past I found

issues that the county and vendor missed and the board had to get some issues corrected before past elections.

It's good to have a conversation, however I am concerned that the below has not been provided at this time, as there should not be anything in the asks that I would not be allowed to see.

Exhibit B to Complaint.

To date, and apart from the October 22, 2024 response from the County's Open Records Office purporting to invoke a 30-day time-extension under the RTKL, the County and the BoE has not provided Mr. Van Bibber with access to documents and information that he is rightfully entitled to under the Election Code.

PRELIMINARY INJUNCTION ELEMENTS

"There are six essential prerequisites to a preliminary injunction. The moving party must establish (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury will result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) a clear right to relief; (5) the injunction is reasonably suited to abate the alleged harm; and (6) issuance of an injunction will not adversely affect the public interest." Wolk v. Lower Merion Sch. Dist., 228 A.3d 595, 611 (Pa. Cmwlth. 2020).

A. Immediate and Irreparable Harm

Here, Mr. Van Bibber asserts that he is entitled to a writ of mandamus because the County and the BoE have violated and continue to violate his rights under a section in the Election Code, 25 Pa.Stat. § 2648, which states in full:

The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents

and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employes having duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act: And provided further, That general and duplicate returns, tally papers, affidavits of voters and others, and all other papers required to be returned by the election officers to the county board sealed, shall be open to public inspection only after the county board shall, in the course of the computation and canvassing of the returns, have broken such seals and finished, for the time, their use of said papers in connection with such computation and canvassing.

(emphasis added).

“For purposes of injunctive relief, statutory violations constitute irreparable harm per se.” Wolk, 228 A.3d at 610. See Pennsylvania Public Utility Commission v. Israel, 52 A.2d 317, 321 (Pa. 1947) (“When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.”). Indeed, “[t]he violation of a statute constitutes immediate and irreparable harm and issuing a preliminary injunction to avoid such a violation is justified.” Israel, 52 A.2d at 321. Here, in denying Mr. Van Bibber access to his requested documents, reports, and records, the County and/or BoE breached the statutory duty that it owes to Mr. Van Bibber under 25 Pa.Stat. § 2648. Because the continued violation of 25 Pa.Stat. § 2648 automatically constitutes immediate and irreparable harm, Mr. Van Bibber has satisfied the first element for a preliminary injunction.

Moreover, if the County and/or BoE continues to delay in providing the requested documents, reports and records, then it will be too late to correct the problems that Mr. Van Bibber is likely to find, given the pattern of his finding problems in the past, before those problems impact the election results in a way that will be difficult or impossible to remedy after the election. Problems that Mr. Van Bibber found in the past utilizing digital images and CVRs from the L & A tests conducted in

prior elections in Allegheny County include blurry images and lines through timing marks. Those were issues that were able to be addressed prior to using the relevant machines in the elections.

In addition, by viewing configuration reports, voting results reports, and zero reports from the L & A testing, in prior elections in Allegheny County, Mr. Van Bibber was able to identify protected counts that were improperly set back to zero on some or all of the DS200 machines that Allegheny County uses in conducting elections (similar to rolling back the mileage to zero on a used car). He wishes to confirm that all of the necessary reports were generated and that this problem did not repeat and confirm the protected count on each machine before the November 5, 2024 election. Mr. Van Bibber requested the serial numbers of the backup machines that Allegheny County did not test, to be able to object tomorrow if those backup machines are attempted to be used without first conducting the required L & A testing. Mr. Van Bibber requested to review the video recording of L & A testing to confirm which machines were tested and that testing was properly conducted. Mr. Van Bibber faces immediate and irreparable harm if this Court does not grant an emergency preliminary injunction compelling the County and/or BoE to provide Mr. Van Bibber with the opportunity to access, inspect, and photocopy the requested documents prior to the general election on November 5, 2024.

B. Weighing of Harms

Similar to the analysis above, this Court need not weight the respective harms to the parties because a violation of a statute is considered to be injurious to the public at large and the party of whom is offended, and a party cannot be substantially harmed if it complies with its obligations under a statute. See Wolk, 228 A.3d at 610 (“Statutory violations constitute irreparable harm *per se*, which relieved the trial court of undertaking the balance of the harm inquiry.”). Regardless, if this Court declines to grant a preliminary injunction, Mr. Van Bibber would sustain greater harm than the County or BoE because Mr. Van Bibber would be denied his rights to access and obtain election-related

information under 25 Pa.Stat. § 2648. Conversely, the County and BoE would not suffer any harm because all they would have to do is comply with the directives of 25 Pa.Stat. § 2648, and provide Mr. Van Bibber with an opportunity to inspect and copy reports, records, and documents pertaining to the County's L & A testing of its voting machines. Notably, in the past, the County and BoE provided Mr. Van Bibber with an opportunity to inspect and copy reports, records, and documents pertaining to the County's L & A testing of its voting machines, and they cannot now claim any type of undue hardship. Therefore, greater injury would result if this Court did not grant a preliminary injunction in favor of Mr. Van Bibber.

C. Status Quo

“A preliminary injunction is appropriate where it restores the parties to the status quo that existed prior to the alleged wrongful conduct.” Wolk, 228 A.3d at 611. “[A]n injunction addresses the status quo as it existed between the parties before the event that gave rise to the lawsuit, not to the situation as it existed after the alleged wrongful act but before entry of the injunction.” Id. See Tinicum Twp. V. Delaware Valley Concrete, Inc., 812 A.2d 758, 762 (Pa. Cmwlth. 2002) (“The status quo to be preserved by a preliminary injunction is the last peaceable and lawful non-contested status preceding the underlying controversy between the parties or the alleged wrongful conduct of the party whose actions are sought to be enjoined.”). Here, the conduct of the County and the BoE in denying Mr. Van Bibber access to his requested documents, records, and reports violates 25 Pa.Stat. § 2648. If the Court granted a preliminary injunction, and the County and the BoE complied with the injunction, this would restore the County and BoE to lawful conduct and maintain the status quo as it existed prior to the point where the County and the BoE decided to contravene 25 Pa.Stat. § 2648. As noted, in the past, the County and BoE complied with 25 Pa.Stat. § 2648 and provided Mr. Van Bibber with an opportunity to inspect and copy reports, records, and documents pertaining to the

County's L & A testing of its voting machines. Therefore, a preliminary injunction would maintain the status quo ante.

D. Clear Right

“For a right to be clear, it must be more than merely viable or plausible; however, this requirement is not the equivalent of stating that no factual disputes exist between the parties.” Wolk, 228 A.3d at 611 (internal citations and quotation marks omitted). “The party seeking a preliminary injunction need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.” Id. (internal citations and quotation marks omitted).

Here, the plain language of 25 Pa.Stat. § 2648 requires the County and/or the BoE to keep election-related records, reports, and documents open to the public, including Mr. Van Bibber, for inspection and copying, namely “during ordinary business hours, at any time when they are not necessarily being used.” Id. Under 25 Pa.Stat. § 2648, the County and/or BoE has an unqualified duty to provide Mr. Van Bibber with access to the above-mentioned documents, reports, and records, namely after the L & A testing was completed and no one was testing or otherwise using the voting machines. However, for at least a period of thirty-eight days, the County and/or BoE denied Mr. Van Bibber access to his requested information “during ordinary business hours” without lawful justification or excuse. To the extent the County or BoE relied on the extension period in Section 902 of the RTKL, this was error because Mr. Van Bibber's request for information is governed by the Election Code, and 25 Pa.Stat. § 2648 does not have any time extensions for requests. To the contrary, pursuant to 25 Pa.Stat. § 2648, the County and/or the BoE must make the requested information immediately available for inspection and cannot delay, so long as no one is using or operating the voting machines. Therefore, the Election Code displaces and/or supersedes the RTKL. See Section

3101.1 of the RTKL, 65 Pa.Stat. § 67.3101.1 (“If the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.”); Pennsylvanians v. Pa. Dep’t of State, 138 A.3d 727, 732-34 (concluding that the access to information provisions of the Voter Registration Act preempted and displaced provisions of the RTKL). As such, Mr. Van Bibber has a clear right to relief.

E. Suited to Abate the Harm

Here, consistent with the mandates of 25 Pa.Stat. § 2648, the requested injunction seeks to have the County and/or the BoE provide Mr. Van Bibber with access to his requested reports, records, and documents and the opportunity to inspect and photocopy said reports, records, and documents. The requested injunction is therefore tailored to abate the offending activity in line with the rights 25 Pa.Stat. § 2648 grants to Mr. Van Bibber and the obligations that 25 Pa.Stat. § 2648 imposes upon the County and the BoE.

F. Public Interest

In enacting 25 Pa.Stat. § 2648, the General Assembly made a policy-based judgment that it would be in the public interest to authorize electors to access, inspect, and photocopy election-related reports, records, and documents. In violating 25 Pa.Stat. § 2648, the County and the BoE are violating not only public policy, but also the public interest in election integrity and transparency. Therefore, if this Court granted Mr. Van Bibber a preliminary injunction, the public interest would be served and advanced because the injunction would require the County and the BoE to comply with 25 Pa.Stat. § 2648 and the spirit of the Election Code in general.

CONCLUSION

For the above-stated reasons, this Court should grant Mr. Van Bibber's motion for a preliminary injunction and enter a preliminary injunction requiring the County and the BoE to allow Mr. Van Bibber to exercise his rights pursuant to 25 Pa.Stat. § 2648.

Respectfully submitted,



Dated: November 4, 2024

Gregory H. Teufel, Esquire
Adam G. Locke, Esq.
Attorneys for Matthew Allen Van Bibber

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 4, 2024



Gregory H. Teufel, Esquire

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this 2nd day of November, 2024 served a copy of the foregoing Brief in Support of Motion for Preliminary Injunction upon the following counsel of record via email and first-class U.S. mail:

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Dated: November 4, 2024



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