



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ELAINE GILLEN,	:	
Requester	:	
	:	Docket No.: AP 2015-1938
v.	:	
	:	
MUNICIPALITY OF MT. LEBANON,	:	
Respondent	:	

INTRODUCTION

Elaine Gillen (“Requester”) submitted a request (“Request”) to the Municipality of Mt. Lebanon (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking e-mails pertaining to a deer management hunting program. The Municipality partially denied the Request, withholding from public disclosure certain e-mails that would threaten personal security and reveal the identities of donors. 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 Municipality is required to take further action as directed.

FACTUAL BACKGROUND

On July 30, 2015, the Request was filed seeking “[a]ll communications to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola’s archery program from June 18, 2015 to the present.” On August 5, 2015, the

Municipality invoked a thirty-day to respond to the Request. *See* 65 P.S. § 67.902. On September 4, 2015, the Municipality partially granted the Request, providing 131 e-mails to the Requester. The Municipality denied access to certain e-mails that would identify the private properties being used for the archery hunt, arguing that public access of those records would result in a substantial and demonstrable risk to the personal security of the property owners. *See* 65 P.S. § 67.708(b)(1). The Municipality also denied access to those e-mails stating that the e-mails would identify those individuals making a donation to an agency. *See* 65 P.S. § 67.708(b)(13).

On September 18, 2015, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 30, 2015, the Municipality submitted a position statement, reiterating the same reasons for withholding the records from public disclosure. The Municipality also submitted the sworn affidavits of Stephen Feller, Manager and Open Records Officer for the Municipality, and Chief Aaron Lauth, Chief of Police for Mt. Lebanon. In its submission, the Municipality provides a discussion of the deer management techniques in the Municipality that was attempted last year, which was “trap and euthanize.” The Pennsylvania Game Commission permitted a program wherein deer were lured into corrals resulting in the deer being entrapped and shot. This year, the Municipality awarded a contract to White Buffalo to institute an archery program to manage the deer population. The contractor would screen, train and manage archers for the hunt which is occurring on public and private properties. The contractor contacted the

property owners and neighbors for permissions required under the Pennsylvania Game Commission's hunting and safety rules.

On October 1, 2015, the Requester submitted her position statement, stating that during public meetings, certain individuals indicated their support for the hunting program and the minutes reflect the names and addresses of these individuals.

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.” 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.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless

exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly 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 Municipality states that certain e-mails were not produced that would identify the persons volunteering time as an archer or permitting the use of their property to conduct the archery program. The Municipality argues that the release of these e-mails would threaten personal security of these individuals. Section 708(b)(1)(ii) of the RTKL protects “a record, the disclosure of which ... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii).

Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. The term, “substantial and demonstrable risk” is not defined in the RTKL. By construing these terms in accordance with their plain

meaning, 1 Pa.C.S. § 1903(a), the risk of harm must be material, real and ample. The risk of harm must also be demonstrable, which is defined as being obvious or apparent. *See Swartzwelder v. Butler County*, OOR Dkt. AP 2009-0632, 2009 PA O.O.R.D. LEXIS 129. Mere belief that the release of a record would cause substantial and demonstrable risk of harm is insufficient. *Zachariah v. Dep't of Corrections*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

Chief Lauth explains that deer management in the Municipality has been “hotly debated and very contentious.” He provided the OOR with the Commission’s public website to view the community’s comments at Commission meetings arguing against a lethal deer management program. Chief Lauth further explains that past deer management programs have also been controversial and resulted in numerous incidents, such as tampering with the bait, wedging sticks in corral doors to prevent deer from being caught and loud noises to scare deer away. With respect to this deer management program, Chief Lauth attests that the Municipality hired a third party to locate and test qualified hunters, determine the hunting locations and determine compliance with Game Commission rules. The Municipality made five of its public lands available and private property owners could also provide access to their land. The Municipality has chosen to keep the location of the private property confidential because of what it believes is a reasonable likelihood that property owners and those associated with the program may encounter problems such as those encountered in previous years.

Although the Municipality has provided evidence of incidents in past years which involved tampering with traps and scaring deer, none of the evidence demonstrates that there were any threats to individuals involved in the deer management programs, either past or present.

As Section 708(b)(1) requires more than conjecture, the Municipality has failed to demonstrate that the e-mails are not subject to public disclosure under Section 708(b)(1) of the RTKL.

2. Section 708(b)(13) of the RTKL does not apply

The Municipality denied access to e-mails identifying landowners that are allowing the access to their land for the deer management program as records that would reveal the identity of an individual making a donation to the agency. Section 708(b)(13) of the RTKL, which exempts from disclosure:

[r]ecords that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

65 P.S. § 67.708(b)(13). Here, the Municipality provides the Merriam-Webster definition of “donate”, which states, in pertinent part: “to make a gift of; especially: to contribute to a public or charitable cause.” The Municipality argues that the participants in the program are donating the use of their land. However, the landowners are not gifting their property to the program, they are simply allowing temporary access to their property and it will at all times remain the property of those individuals, not the program. Section 708(b)(13) does not apply in this matter, as nothing is being donated.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Municipality is required to provide all e-mails 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 Allegheny County Court of Common Pleas. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity

to respond as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 24, 2015



APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Elaine Gillen (via e-mail only);
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