



COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

TOM FORD and THE BORO, : No. 5082 CV 2020
Requester, :
vs. :
MOUNT POCONO BOROUGH, :
Respondent. :

OPINION

The Borough of Mount Pocono ("Borough") has filed a Petition for Review of the decision of the Pennsylvania Office of Open Records (OOR) directing the Borough to produce records of a Facebook account. The case began when Tom Ford, editor of local newspaper "The Boro", requested that the Borough produce records logged since April 16, 2020 under the "Moderate Group" tab of the "Mount Pocono Borough Updates by Council" Facebook Group. The OOR Appeals Officer granted Ford's request for production of the Facebook records. The Borough petitioned for review, alleging that the Appeals Officer erred in finding that the requested records constituted official records.

A *de novo* hearing was held on December 7, 2020. Mr. Ford did not appear. The Borough did appear and presented the testimony of Borough Council President Claudette Williams and Borough Mayor Michael Penn. Mount Pocono further submitted a brief and evidence of the Facebook Group's contents. *Borough Exhibit 1*.

FINDINGS OF FACT

1. On May 20, 2020, Tom Ford submitted a request pursuant to the Pennsylvania Right to Know Law, requesting:

Copy of all "Admin Activity" logged since 4/16/20 under the "Moderate Group" tab of the "Mount Pocono Borough Updates by Council" Facebook Group; all "Pending Posts" shown for that group on May 20, 2020 at the time of receipt of this request (you are advised to preserve such materials); all documents constituting or reflecting communications on or after 4/1/20 between, among, or including Bonnie Roberts Glamocak, Michael Penn, and/or Claudette Williams regarding that Group, including but not limited to [F]acebook messenger, private emails, and text messages (you are advised to preserve such materials).

Certified Record of Proceedings before the OOR, Appeal Filed by Tom Ford and "The Boro."

2. On May 26, 2020, the Borough denied the request, asserting that that no responsive records exist, and if they did exist, they would not be "records" as contemplated by the Right to Know Law. *Id.*, *Submission of the Borough of Mount Pocono to the OOR.*

3. The Borough informed the OOR on June 24, 2020 that it would locate and provide the records, but did not concede that it owned or operated the Facebook Group. It did not produce these records.

4. On July 24, 2020, the Borough informed the OOR that the records did not belong to the Borough, and that it had unsuccessfully attempted to locate and access responsive records.

5. On August 24, 2020, OOR Appeals Officer Jordan C. Davis, Esq. issued a Final Determination granting Tom Ford's request for records.

6. The Facebook Group was created by Claudette Williams in December 2014 and was used for her campaign for public office. The original title of the group was "Claudette for the People." Ms. Williams was elected to Borough Council in 2014 and at the time of the hearing was the President of the Borough Council.

7. In April 2019, Ms. Williams renamed the group "Mount Pocono Borough Updates by Council." She was president of Borough Council at that time. This was her personal decision; it was not discussed or approved by the Borough Council.

8. Bonnie Glamocak became the administrator of the page; she was not a Council member.

9. Bonnie Glamocak, Claudette Williams and Michael Penn were administrators of the group when Mr. Ford filed his request. Michael Penn was the Mayor of Mount Pocono at the time.

10. On April 16, 2020, the description of the group read as follows:

Mount Pocono Borough Council would like to open a platform to discuss things that are important to the community. On this page you will find Junior and Borough meeting updates, community events, and much more. Here we have the opportunity to support one another, voice concerns without fear of criticism and become the community our families deserve.

Submission of Tom Ford, cited by OOA in its opinion, page 6, fn.1.

11. Ms. Glamocak was removed as an administrator on May 20, 2020.

12. On June 30, 2020, after Tom Ford filed the records request, the name of the group was again changed, to "Mount Pocono Borough Residents."

13. The Facebook Group is currently described as follows:

The aim of this page is to engage residents of Mount Pocono Borough Council in an open platform to discuss things that are important to the

community and to keep residents of the Borough current on the happenings around the Borough and in the area. On this page, you may post and discuss community events, ideas, concerns, and much more—in a polite, supportive, constructive manner. Here, we have the opportunity to support one another, voice concerns without fear of criticism, and become the community our families and friends deserve. You must be a resident of Mount Pocono Borough to join this group. Disclaimer: This group is not affiliated with Borough government, nor does it communicate any official business, intent, or policy of the Borough of Mount Pocono. Its purpose is to independently encourage non-divisive, apolitical discussion, and neither the creation of nor the maintenance of this Group has been discussed or approved by Borough Council.

Attestation of Mayor Penn, cited on page 5 of the OOA decision.

14. Tom Ford's submissions to the appeals officer demonstrate several occasions on which Borough Council members posted about Borough matters:

a. On April 17, Bonnie Roberts Glamocak posted that she was "only helping to set this page up for the borough to use. I am not on the council. Any Claudette Williams material you may have seen posted was part of the transition. Be safe everyone!" Council member Stacy Stewart-Keeler "liked" this post. It was viewed by Claudette Williams, Council President, and Mayor Penn.

Certified Record of OOA Proceedings, Exhibit 6, Submission to OOA by Tom Ford,

b. Claudette Williams posted on April 19 about a Pop-Up Food Pantry, where "Mount Pocono Borough is trying to help feed senior citizens in this time of need"

Id.

c. Council Member Tom Neville posted on April 20 "responding to some of the questions asked of me by my neighbors" and signed the post "Council Tommy Neville"

Id.

d. Tom Neville posted again on May 5, seeking "local heat and air conditioning companies for estimates for work to be done at municipal building"

Id.

e. Claudette Williams posted on May 10 seeking assistance "identifying a family in need of food and support paying electricity bills" after an anonymous donation. The names of potential recipients of aid were directed to be emailed to "Council President Claudette Williams... or Mayor Michael Penn."

Id.

f. On May 19, Tom Neville requested feedback from residents about recreational fire pits in the borough.

Id.

g. On May 20, Claudette Williams notified residents of a possible upcoming water rate increase for the borough.

Id.

h. On May 25, Claudette Williams streamed the Memorial Day ceremonies in the Facebook Group to cut down on in-person attendance.

Id.

i. On June 5, Mayor Penn and Claudette Williams posted about the official Clean-Up Day and solicited volunteers.

Id.

j. On June 20, Claudette Williams communicated with a resident asking about procedure for council meetings.

Id.

k. On July 1, Tom Neville announced his plans to start a flea market on Borough property; sought input from Borough residents, and signed his name "councilman Tommy Neville."

Id.

15. Mayor Penn and six of the seven Council members, including President Williams, were members of the "Mount Pocono Borough Updates by Council" Facebook group at the time the Ford request was filed. *Id.*

DISCUSSION

A requester or local agency may file a petition with a court of common pleas for review of a final determination of a decision by an Office of Open Records Appeals Officer, 65 P.S. §67.1302(a). The Borough appealed the OOR's final determination on September 23, 2020. On appeal, the court's decision shall be based on the "evidence as a whole,"

and it shall "clearly and concisely explain the rationale for the decision." *Id.* The appropriate standard of review for a court reviewing decisions of an OOR Appeals Officer is *de novo* and the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

I. Information in the Facebook Group as a Borough Record

The purpose of the RTKL is to "promote access to government information in order to prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions." *Ali v. Philadelphia City Planning Comm'n*, 125 A.3d 92, 99 (Pa. Cmwlth. 2015). Under the RTKL, agency records are presumed to be public records and are required to be made available to a requester, unless the local agency can show a specific exception applies. 65 P.S. §§ 67.305, 67.708. A "record" is

"information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes...information stored or maintained electronically and a data-processed or image-processed document."

65 P.S. §65.102.

"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, LLC v. Wintermantel*, 45 A.3d 1029 1041 (Pa. 2012). The RTKL 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. Cmwlth. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The appeals officer determined that the statements and actions made through the Facebook Group constitute a public record of the Borough, and are therefore subject to disclosure under the RTKL. The Borough contests this finding and presented evidence and a brief in support of its position.

The Facebook Group involved here was not created by resolution of the Council. The question of whether its posts may be considered a "record" under the RTKL has not been addressed by our appellate courts. The OOR has noted that because the RTKL is remedial legislation, the definition of "record" must be liberally construed. A *Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Cmwlth. 2011). The OOR has ruled here and in earlier decisions that a Facebook Group does not have to be sanctioned by the government body as a whole to constitute a record of official business on matters such as "economic development, community planning, maintenance, public safety, and community service projects within the Borough." *Purdy v. Borough of Chambersburg*, OOR Dkt. Ap 2017-1229, 2017 PA O.O.R.D. LEXIS 1224, (citing 8 Pa.C.S. §§10A06, 10A07, which sets forth the powers and duties of borough mayors).

Claudette Williams testified that she is the President of Borough Council and that she created the Facebook Group when she ran for public office and titled it "Claudette for the People." She developed a food pantry for people in need after she became a Council member and wanted to advertise its services. She changed the name of the Facebook page to "Mount Pocono Borough Update by Council" to carry out her advertising plans. She was an administrator of the group, as was Bonnie Glamocak and Mayor Penn. Ms. Williams testified that the Facebook Group was not an official Facebook Group of the

Borough Council. She testified that the Group advertised the food pantry and provided inspirational messages to residents of the Borough.

The Borough offered Borough Exhibit 1, which contained screen shots of pages on the Facebook Group. These screen shots were from before and after Mr. Ford made his request. They do not specifically reference Borough Council projects or business, and include inspirational sayings and other offerings of general community interest. However, the exhibit did not include all postings during the relevant time period.

Michael Penn, the Mayor of the Borough, testified that he was a member and an administrator of the Facebook Group and that it was not an official platform for Borough Council business.

The record certified by the OOR shows other posts which Mr. Ford obtained from the site. These posts demonstrate that council members were posting in their official capacity as members of Council regarding matters concerning planning, maintenance, and community service projects. It should also be noted that the Group description and name were changed after Ford filed his records request, including the "disclaimer" which was added, stating that the page is not affiliated with the Borough Council. Six of the seven members of Council were members of the Facebook Group; the President of Council and the Mayor of the Borough were administrators of the site and it billed itself as "Mount Pocono Borough Updates by Council" at the time the request was made.

The content of the Facebook page shows that at the time of the request, it was being used as a significant platform by a number of borough council officials and mayor to conduct economic development, community planning, maintenance and community

service projects within the Borough. The Borough Council didn't officially adopt the page, but Ford demonstrated that six of the seven members of Council used it for Borough business. The Facebook Group therefore constituted public record under the Right to Know Law and the Final Determination by the OOR will therefore be affirmed.

II. Existence of Responsive Records

The Borough attempted to voluntarily comply with the request while this case was before the OOR. The Mayor reported to OOR that the records sought "do not exist." *Report of Mayor Penn before the OOR quoted in the OOR decision, page 7.* The Mayor's report states that "Facebook does not allow for date range selection of 'Admin Activity.'" *Id.* Mr. Ford requested "all Admin Activity logged since 4/16/20 under the 'Moderate Group' tab..." *Request of Tom Ford.* The OOR hearing officer found that the "Admin Activity" log of the Facebook Group is accessible using filters available on the site. The Borough will therefore be directed to "try again," as directed by OOR.

The Mayor's report also states that he was unable to obtain "Pending Posts" as of May 20, 2020 and at the time of receipt of the request. The OOR appeals officer found that the Borough could obtain pending posts that had not been accepted, and if necessary it could redact posts pending before April 16, 2020. If a post was accepted, it would no longer be available in "pending posts," but a record of its acceptance would be available in the "Admin Activity" log which the Borough is required to produce.

Finally, Mr. Ford's request clearly included "communications after 4/1/20 between, among, or including Bonnie Roberts Clamocak, Michael Penn and/or Claudette Williams regarding the group but not limited to Facebook Messenger, private emails, and text

messages..." (Emphasis added). The Mayor stated that he did not have such communications, but it is not clear that the Borough did a document request to the other Council members who were members of the Facebook Group. The Borough is therefore obligated to "contact members of its council who may possess responsive records" as noted by the appeals officer.

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ORDER

AND NOW this 22nd day of December, 2020, upon consideration of the Borough of Mount Pocono's Petition for Review of Decision of Pennsylvania Office of Open Records, the record certified by the Office of Open Records, the Borough's additional evidence and brief, **IT IS ORDERED** that:

1. The relief requested in the petition is **denied** and the decision of the Appeals Officer is **affirmed**.
2. Mount Pocono Borough shall provide Tom Ford and The Boro with the responsive records within (30) days. It may redact any information not subject to disclosure.

BY THE COURT:

Arthur L. Zulick
ARTHUR L. ZULICK, J.

PROTHONOTARY
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MONROE COUNTY, PA

cc: Tom Ford, Esq.
James Fareri, Esq
Office of Open Records, 333 Market Street, 16th Fl., Harrisburg, PA 17101-2234
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