



FINAL DETERMINATION

IN THE MATTER OF

**ANDREW POPP,
Requester**

v.

**NEWBERRY TOWNSHIP,
Respondent**

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Docket No: AP 2021-1973

INTRODUCTION

Andrew Popp (“Requester”) submitted a request (“Request”) to Newberry Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of deleted comments from the Township’s Facebook page. The Township denied the Request, arguing that the Township does not possess certain records. For the reasons set forth in this Final Determination, the appeal is **denied**, and the Township is not required to take any further action.

FACTUAL BACKGROUND

On September 9, 2021, the Request was filed, seeking:

Copies of all Public comments (records) the Township has deleted from their Facebook Page since the inception of the Governmental agency page and all comments that were deleted in relation to the following notice on 09/08/2021. “Just a note to our Facebook followers: We appreciate everyone who follows us and takes advantage of the information we provide on this site. However, obscene and /or abusive speech is not acceptable and any such comments on our page will be deleted. Tony Miller Township Manager” <https://www.facebook.com/Newberry-Township-york-County-Pennsylvania-105692488108962>

On September 15, 2021, the Township denied the Request,¹ stating that the Township does not possess responsive records.

On September 16, 2021, 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 Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 1, 2021, after being afforded additional time to do so, the Township submitted a position statement reiterating its grounds for denial.² Accompanying the submission was the sworn attestation of Anthony Miller, Open Records Officer for the Township, attesting that the responsive records sought were not in the control or custody of the Township. On October 6, 2021, the Township submitted a supplemental attestation from Mr. Miller providing a link to a Facebook article.

On October 3, 2021, the Requester submitted a response to the Township's position statement, arguing, in part, that "the Township has not tried hard enough to recover or retrieve the comments they deleted from their Facebook page." The Requester further attached what purports to be a deleted comment from an individual named Mike Krone. The Requester also submitted a response to the Township's supplemental attestation on October 6, 2021.³

¹ The Township's letter denying the Request did not include a date. However, the Township's position statement indicated that the Request was denied on September 15, 2021.

² The Requester also submitted a position statement in response to the Township's submission on October 3, 2021.

³ The Township's October 6, 2021 submission and the Requester's October 6, 2021 response were received after the record closed; however, to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

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 Township 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 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 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)(1). 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) 4 (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Township argues that the deleted Facebook comments could not be retrieved and that the Facebook comments are no longer available to the Township. Additionally, the Township argues that it contacted Facebook customer service about retrieving deleted comments and Facebook customer service directed the Township to a link with an article that explained that deleted comments are not archived and cannot be retrieved. In support of the Township’s position, Mr. Miller attests the following:

1. I serve as the Agency Open Records Officer (“AORO”) for Newberry Township (“Agency”) and am responsible for responding to Right-to-Know requests filed with the Agency.
2. In my capacity as the AORO, I am familiar with the records of the Agency.
3. Upon review of the request from Andrew Popp, I searched the Facebook page for any deleted comments but was unable to find any.
4. I contacted Facebook’s customer service to inquire whether deleted comments could be retrieved. I was informed that Facebook does not archive deleted comments, and that there was no way to retrieve any comments.

5. The Township maintains no separate record of Facebook comments, so any deleted Facebook comments are no longer available to the township.

The Township also submitted a supplemental attestation. Mr. Miller additionally attests the following:

3. As I stated in my affidavit from October 1, 2021, I contacted Facebook's customer service to inquire whether the deleted comments could be retrieved. I was informed that Facebook does not archive deleted comments, and that there was no way to retrieve any deleted comments.
4. To elaborate, Facebook customer service directed me to a link with an article that explained that deleted comments are not archived and cannot be retrieved after deletion.
5. The link that Facebook gave to me is at this URL:
<http://www.facebook.com/help/121995105053180/>
6. I have attached to this affidavit the article to be found at that link.
7. To the best of my recollection, I have only deleted two comments on the Township's Facebook page, both of which contained obscene language.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Township has acted in bad faith or that the records exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).⁴ Here, the Township has submitted

⁴ The Requester asserts that the Township acted in bad faith because "they could try many more ways than one or two to recover or retrieve the comments they intentionally deleted" and asks that the Township "utilize an Internet professional to help find or access their 'deleted' Facebook messages." However, the OOR declines to make a finding of bad faith when the Township reached out to Facebook and was provided a link that explains that deleted content cannot be retrieved.

evidence that they reached out to Facebook and are no longer able to retrieve the deleted comments. The record supports the Township's assertions that the requested information does not currently exist in any ascertainable format. *See Paint Twp. v. Clark*, 109 A.3d 796, 805 (Pa. Commw. Ct. 2015) (finding that the Township was not required to conduct a forensic search in order to create a record which does not exist). Based on the evidence provided, the Township has met its burden of proof that the requested records are no longer available to the Township.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Township is not required to take any further action. 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 York 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 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 14, 2021

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent via email to: Andrew Popp (via email only);
Tony Miller, AORO (via email only);
Douglas Myers, Esq. (via email only)

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