



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ROBERT BOYER,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2018-1110
	:	
WYOMING BOROUGH,	:	
Respondent	:	

INTRODUCTION

Robert Boyer (“Requester”) submitted a request (“Request”) to Wyoming Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information related to a Facebook page. The Borough denied the Request, arguing, among other things, that certain records do not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Borough is required to take further action as directed.

FACTUAL BACKGROUND

On May 7, 2018, the Request was filed, seeking:

From the official “Joseph Dominick Mayor of Wyoming” “Public Figure” Facebook page all of the following records:

1. List and contact information of all page administrators, editors, or other roles.
2. All comments made and removed or blocked from the page. Policy and procedure for blocking or removing comments.
3. All profile names used by Joseph Dominick or other page administrators or editors and used to post to official comments.
4. All electronic messages that have been sent to the official Facebook Page and responses from the page administrators, editors, etc. Also include any

- additional emails related to the Facebook page content, comments or profiles received outside of the Facebook message function.
5. All profile names that are known to be false, or have been known to be false, and identities of the actual page owner. Were knowingly fake profiles permitted to post to the page?
 6. The true names and identities of any false profiles that post to the page.
 7. The policy and procedure for managing posts from fake profiles.
 8. The policy and procedure for allowing false, defamatory, harassing, or hateful posts, especially those directed at Borough employees or officials to be posted and remain on the page.
 9. Printouts of all posts made to the page and “liked” by the administrator, editors, or other page roles.
 10. A list of any and all fake or fictitious Facebook pages maintained and operated by any page administrator, editor, or other person having any involvement in any way with the official Facebook page.

On May 9, 2018, the Borough invoked a thirty-day extension to respond to the Request, 65 P.S. § 67.902(b), but did not timely respond, and the Request was deemed denied on June 14, 2018. 65 P.S. § 67.901. However, on June 21, 2018, the Borough filed a final response, denying the Request on the basis that the Facebook page in question did not belong to the Borough.

On June 25, 2018, 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 Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 16, 2018, the Borough submitted a position statement, arguing that it does not possess records responsive to Items 1-3, 5-8, or 10 of the Request, and that records responsive to Item 9 of the Request are readily available online. The Borough further argued that the Facebook page in question is not an official Borough page and that the records that do exist related to it are not in the Borough’s possession, custody, or control. In support of this argument, the Borough submitted the verification of Mayor Joseph Dominick, who attested that he is not authorized to

post on the Borough's official sites, that they do not sanction or link to his Facebook page, and that he had nevertheless conducted a search and found that most of the records sought do not exist.

On July 17, 2018, the Requester submitted argument that the Facebook page has a direct nexus to Borough matters and is used in an official capacity. On August 8, 2018, the Requester followed with a second position statement arguing that the Borough did possess certain records by virtue of Facebook's settings features, and that he cannot access the records on Facebook due to his lack of a personal page on that service.

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 LLC 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 sought a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Borough 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 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 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).

1. The Facebook page is a record of the Borough

The Borough argues that the Request does not seek records of the Borough; rather, it seeks records of a private Facebook account because the account was not created, administered or sanctioned by the Borough. Section 102 of the RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of the agency and that is created, received or retained pursuant to law or in connection with a transaction,

business or activity of [an] agency.” *Id*; *see also Allegheny Cty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance, Inc.*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012). The OOR has previously analyzed the application of the RTKL to Facebook pages and concluded that it was “immaterial whether or not the Borough has oversight over the Facebook page or authorized the Mayor to maintain such an account.” *Purdy v. Borough of Chambersburg*, OOR Dkt. AP 2017-1229, 2017 PA O.O.R.D. LEXIS 1224. Rather, the OOR looks at whether the content of the Facebook page shows that it is used as a significant platform by an elected official to conduct official business such as “among other things, economic development, community planning, maintenance, public safety and community service projects within the Borough.” *Id*, *see also* 8 Pa.C.S. §§ 10A06, 10A07 (setting forth the powers and duties of borough mayors).

The Facebook page at issue is titled “Joseph Dominick Mayor of Wyoming,” and is categorized as a “Public Figure” page. Nearly all of the postings on the face of the page consist of Mayor Dominick’s opinion on news stories involving the Borough and political entities affiliated with the Borough, announcements of Borough council meeting times and places, and discussion on topics of public interest within the Borough. Although Mayor Dominick attests that his page is not authorized by the Borough’s council or administration, he possesses his own set of responsibilities and powers in overseeing the Borough as its mayor, and it is apparent that he uses this Facebook page in his role as mayor as a tool to foster community action and engagement. Therefore, the Facebook page is a public record of the Borough. Because the Borough did not

submit any other legal rationale for withholding records responsive to Item 4 of the Request, the appeal must be granted as to that item.

2. The Borough must provide paper copies of records responsive to Item 9 of the Request upon payment of all applicable fees

Item 9 of the Request seeks “[p]rintouts of all posts made to the page and “liked” by the administrator, editors, or other page roles.” On appeal, the Borough argues that these records are available online by accessing the Facebook page itself. Section 704(b) of the RTKL permits an agency to respond to a request for records “by notifying the requester that the record is available through publicly accessible electronic means[.]” 65 P.S. § 67.704(b)(1). If a requester is unwilling or unable to access the records electronically, the requester may “submit a written request to the agency to have the record converted....” 65 P.S. § 67.704(b)(2). An appeal to the OOR is not “a written request to the agency to have the record converted” and does not trigger an agency’s responsibility to take further action pursuant to Section 704(b)(2) of the RTKL. *See Borden v. Ridgebury Twp.*, OOR Dkt. AP 2011-1460, 2011 PA O.O.R.D. LEXIS 1223. Here, however, the Requester has indicated to the Borough in writing that he is unable to access Mayor Dominick’s Facebook page within thirty days of the Borough’s provision of the records under Section 704(b) of the RTKL. Therefore, the Borough must provide the Requester with paper copies of the records responsive to Item 9 of the Request.¹

3. The Borough has demonstrated that some responsive records do not exist

The Borough argues that some of the requested records do not exist. In support of this argument, the Borough submitted the verification of Mayor Dominick, who attests that:

“In addition, a good faith search for records requested was conducted, despite the objection raised in number 2 above, and the following records do not exist: A list

¹ Although the RTKL favors a contemporaneous exchange of fees for records, under no circumstances is an agency required to provide the records to a requester without receiving the applicable fees. *See Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, 2010 PA O.O.R.D. LEXIS 155.

and contact information of all page administrators, editors, or other roles; all comments made and removed/blocked from the page; policy and procedure for blocking or removing comments; additional profile names; documentation of all profile names that are known to be false, or have been known to be false, and identities of the actual page owner; documentation of the true names and identities of any false profiles that post to the page; the policy and procedure for managing posts from fake [profiles]; the policy and procedure for allowing false, defamatory, harassing, or hateful posts, especially those directed at Borough employees or officials to be posted and remain on the page; a list of any and all fake or fictitious Facebook pages maintained and operated by any page administrator, editor, or other person having any involvement in any way with the official Facebook page.”

Under the RTKL, an attestation 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 Borough has acted in bad faith or that records do, in fact, exist, “the averments in [the verification] 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)). Here, there is no evidence that records responsive to Items 3, 5, 6, 7, 8 or 10 exist and the Mayor, who apparently created and retains control over the Facebook page, attests that he does not possess the policies requested or the lists of fake or fictitious profiles or pages sought by the Requester.² Because the Mayor is the person most likely to be in possession of this information, the Borough has demonstrated that it does not possess records responsive to Items 3, 5, 6, 7, 8 or 10.

However, the Borough has not demonstrated that no records exist responsive to Items 1 or 2. Although Mayor Dominick attests that he is not in possession of any list of page administrators or removed comments, the attestation does not explain the search conducted, and does not

² The Requester argues that this attestation is insufficient because it does not contain Mayor Dominick’s original signature; however, the OOR accepts typewritten signatures as sufficient on attestations. Furthermore, the OOR notes that Pennsylvania courts accept electronic filings as implicitly certifying that the document was properly signed. *See Pa.R.C.P. No. 205.4(b)*.

affirmatively show that the Mayor accessed the Facebook page to look for these records.³ Therefore, the Borough has not demonstrated that no responsive records exist as to Items 1 and 2 of the Request because it has not adequately explained how the Mayor conducted his search for records. *See Pa. Dep't of Labor and Indust. v. Earley*, 126 A.3d 355, 358 (Pa. Commw. Ct. 2015); *St. Hilaire v. Camp Hill Borough*, OOR Dkt. AP 2017-0416, 2017 PA O.O.R.D. LEXIS 465 (requiring an affiant to explain the search conducted).

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Borough providing a sufficient evidentiary basis that no records exist that are responsive to Items 1 and 2 of the Request, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the Borough is required to provide records responsive to Items 1, 2, 4, and 9 of the Request 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 or petition for review to the Court of Common Pleas of Luzerne County. 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 Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the

³ For example, a list of administrators, editors, and those with other roles relating to a Facebook page can typically be found by certain individuals (e.g., a page administrator) choosing “Settings” at the top of the Facebook page, and then choosing “Page Roles” in the left-hand column. *See, e.g.*, <https://www.facebook.com/help/187316341316631/> (last accessed Sept 4, 2018).

OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 5, 2018

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Robert Boyer (via email);
Shannon Crake Lapsansky, Esq. (via email);
Tamra Smith (via email)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).