



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**DANIEL SCHULTZ,
Requester**

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:

:

v.

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Docket No.: AP 2020-1280

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**MONTGOMERY COUNTY,
Respondent**

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INTRODUCTION

Daniel Schultz (“Requester”) submitted a request (“Request”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of a County Commissioner’s social media accounts. The County denied the Request, arguing, that records do not exist because the social media accounts are not maintained by the County. 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 County is required to take further action as directed.

FACTUAL BACKGROUND

On June 8, 2020, the Request was filed seeking:

A list of every Twitter and Facebook account blocked by [Montgomery County Commissioner] Joseph Gale as of June 6th 2020.

The content of all private Twitter discussions (DMs) and private Facebook messages received and sent by Joseph Gale on Twitter as of June 6th 2020.

A list of every Facebook group (private or public) joined by Joseph Gale as of June 6th 2020.

A list of all messages posted on Facebook by Joseph Gale in private and/or public groups as of June 6th 2020.

A list of all messages deleted on Facebook and/or Twitter platforms AFTER June 6th 2020.

On July 14, 2020, after invoking a thirty day extension to respond pursuant to 65 P.S. § 67.902, the County denied the Request, stating that the Commissioner's Facebook, Twitter and Instagram accounts are the Commissioner's private social media accounts and the posts on the accounts are not records of the County.

On July 31, 2020, the Requester appealed to the OOR, challenging the County's denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 21, 2020, the County submitted an affidavit made under penalty of perjury from Joshua Stein, Esq., County Solicitor, attesting to the nonexistence of the records. The County also provided a copy of its complaint for declaratory judgment pending before the Montgomery County Court of Common Pleas, *Montgomery County v. Joseph Gale*, Docket No.: 202-11427 ("County's Complaint"). The County indicates that it is incorporating its arguments made in the Complaint in this matter. Attached to the County's Complaint, as Exhibit 1, is an action pending before Montgomery County Court of Common Pleas filed against the Commissioner Gale by residents of Montgomery County alleging that their First Amendment rights have been violated by actions of Commissioner Gale on his social media accounts. *Deardorff, et. al. v. Joseph Gale*, Docket No.: 2:20-cv-03172 ("Deardorff Complaint"). The Deardorff Complaint contains various postings by the Commissioner on his Facebook, Twitter and Instagram accounts. Included with this

information is the County's Memorandum of its "Review and Report: Ethics Complaint dated August 8, 2017" authored by then County Solicitor, Shelley Smith, Esq., to Commissioner Gale dated August 10, 2017.

On August 21, 2020, the Requester submitted his position statement, arguing that the Commissioner has used the social media accounts in his role as Commissioner and that the County's Complaint verifies the same.

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 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.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither

party requested a hearing; however, as the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The County 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 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 County, through Attorney Stein’s affidavit, confirms that it does not have records responsive to the Request, arguing that it does not operate, maintain or have access to the private social media accounts for Commissioner Gale and the records cannot be produced.

The OOR must first determine whether the Request seeks records of the County as defined by the RTKL. Section 102 of the RTKL defines a “record” as “[i]nformation, 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.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency”; and, if so, 2) was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.” *Id.*; see also *Allegheny Cnty. 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 County argues that it does not maintain or operate Commissioner Gale’s social media accounts; however, in *Purdy v. Chambersburg Borough*, OOR Dkt. AP 2018-1229, 2018 PA O.O.R.D. LEXIS 1224, the OOR held that “it is immaterial whether or not the [agency] has oversight over the Facebook page or authorized the [officer] to maintain such an account.” 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 or employee to conduct or discuss official business such as “among other things, economic development, community planning, maintenance, public safety and community service projects within the [agency].” *Id.*; see also *Boyer v. Wyoming Borough*, OOR Dkt. AP 2018-1110, 2018 PA O.O.R.D. LEXIS 1100.

Here, the County’s Complaint filed in the Court of Common Pleas discusses its August 10, 2017 Memorandum issued to Commissioner Gale and states:

24. ... the memorandum further advised Commissioner Gale: (1) that the manner in which he maintained his Facebook page at that time constituted state action, (2) that complaining citizen’s speech was constitutionally protected, (3) that his Facebook page as managed was public forum, and (4) that banning the comments complaining citizen had constituted viewpoint discrimination prohibited by the First Amendment.

25. The August 10, 2017 memorandum warned Commissioner Gale that ‘comments and followers cannot be barred simply because of the opinions they express,’ that “County Commissioners, like other public officials, can be held liable for violating the federal constitutional rights of citizens,” and that Commissioner Gale’s interaction with citizens on his Facebook pages as managed created liability under federal civil rights law.

The Complaint also alleges that after being provided the memorandum, Commissioner Gale changed his practices on social media; however, he later reverted back to the practices expressed in the August 10, 2017, memorandum. The County received another complaint similar to the complaint leading to the August 10, 2017, memorandum. The County Complaint also states:

28. On June 1, 2020, Commissioner Gale utilized his social media accounts on Twitter, Facebook and Instagram to issue and publicize a document entitled “Press Statement: RIOTS & LOOTING IN PHILADELPHIA” (“June 1 Statement”).

29. Commissioner Gale gave the June 1 Statement the appearance of an official County communication, issuing it on letterhead bearing (1) the County seal, (2) Commissioner Gale’s title as ‘Commissioner’ on the ‘Board of Commissioners’ of ‘Montgomery County, Pennsylvania’ (3) Commissioner Gales’ County email address, and (4) the mailing address of the Commissioner’s Office.

The County also stated in the Complaint that the June 1 posting on Facebook attracted opposition and comments on his social media accounts from the Commissioner’s constituents. Commissioner Gale deleted the comments and the County solicitors warned him that a public official who uses social media in such a way as to create a public forum cannot practice viewpoint discrimination by deleting disagreeing social media comments and blocking access by users who post comments. The constituents whose comments were deleted later filed suit in the Deardorff matter. The County Complaint asks the Court to declare that Commissioner Gale’s deliberate indifference to the guidance of the County Solicitor concerning the First Amendment rights of his constituents

amounts to willful misconduct and beyond the scope of his office and duties that the County cannot be obligated to indemnify.¹

Additionally, the August 10, 2017 Memorandum issued to Commissioner Gale from Solicitor Smith states:

... your ‘Commissioner Joe Gale’ Facebook page contains many ‘trappings’ of the Commissioner’s Office. ...your page was ‘self-evidently’ created at least in light of, if not as a result of, your election to the position of County Commissioner. [And] your title page contains your title. ...the content posted on your page has near exclusive tendency toward matters related to your office: it includes photos of you speaking and appearing at events and breaking ground at facilities in your capacity as County Commissioner, as well as posts and media reports relating to your advocacy of various County issues.

Solicitor Smith concludes “[a]ccordingly, the ‘Commissioner Joe Gale’ Facebook page has all the attributes of a public forum.”

Here, the records requested of Commissioner Gale’s social media accounts contain discussions and posts regarding activities of the Commissioner, in his capacity as the County Commissioner and verified by the County in its Memorandum and Complaint. Accordingly, as in *Purdy*, the OOR determines that the social media accounts of Commissioner Gale meet the criteria of being records of the County under the RTKL. Additionally, the County has not raised any exemptions under the RTKL to withhold the requested records; and, therefore, they are subject to public access. *See* 65 P.S. § 67.708(a)(1); *see also Davison v. Loudoun Cnty. Bd. of Super.*, 2017

¹ Reviewing the Deardorff Complaint submitted by the County in this matter, it contains numerous posts on Commissioner Gale’s social media accounts, including screenshots of the accounts. The Twitter profile @JoeGalePA was accessed on June 25, 2020, has a description as “Montgomery County Commissioner” and the profile picture is Commissioner Gale speaking behind a podium bearing the official seal of the County. The banner photo shows Commissioner Gale shaking hands with certain individuals identified in text as “Joe Gale, Montgomery County Commissioner.” The Deardorff Complaint also contains various Tweets of Commissioner Gale discussing business of the County Commissioners, including on April 24, 2020, discussing the Payroll Protection Plan with a video of Commissioner Gale speaking from a podium with the County seal. Commissioner Gale also has a Facebook, “Vote Joe Gale” and Instagram account @votejoegale that the Deardorff Complaint alleges the Commissioner has discussed agency business and represented himself in his role as County Commissioner. The County’s Complaint or its submission to the OOR did not appear to dispute any of the facts alleged in the Deardorff Complaint.

U.S. Dist. LEXIS 116208 (E.D. Va. July 25, 2017) (holding that a public official’s Facebook account used to conduct official business is “state action.”).

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the County is required to provide access to records responsive to 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 to the Montgomery 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 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Daniel Schultz;
Joshua Stein, Esq.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).