



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

In the Matter of	:	
PAMELA ROMAN,	:	
Complainant	:	
v.	:	Docket No. AP 2009-0528
	:	
MOUNT JOY TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Ms. Pamela Roman (the “Citizen”) submitted a request to Mount Joy Township (“Township”) seeking a copy of a PowerPoint presentation created by Township Supervisor Bill Chantelau. The Township denied the request and responded that the presentation was on the Supervisor’s personal computer and was, therefore, not within the Township’s possession. The Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On May 26, 2009, the Citizen submitted a request for information about the 2008 Township budget via e-mail stating: “If Bill Chantelau did a power point presentation for the 2008 [budget], I would like to have a copy of that as well.” (the “ Request”). The Township considered the request as one pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*

("RTKL"). On June 2, 2009, Brenda Constable, the Open Records Officer for the Township, denied the request and responded as follows:

Supervisor Bill Chantelau used a power point presentation at the October 11, 2007 workshop and at the November 15, 2007 Supervisor's meeting. However, he did his presentation on his own computer; the Township does not have a copy of that presentation.

The Township properly advised the Citizen regarding her right to appeal. On June 5, 2009, the Citizen sent an e-mail to Supervisor Chantelau requesting that he provide a copy of the power point presentation (the "Presentation"). On June 9, 2009, Ms. Constable, on behalf of the Township, responded to the Citizen. She advised the Citizen that, pursuant to RTKL section 705, the Township is not required to create a record that does not exist. She again explained to the Citizen that the Presentation "was created and presented on Mr. Chantelau's personal computer." She adds that it was "never transmitted to the township." Finally, she advises that "since your inquiry of June 5, 2009 to Mr. Chantelau, he has informed me that the power point presentation record from 2007 no longer exists."

On June 22, 2009 the Citizen filed a timely appeal. She argues that the record is public because "Mr. Chantelau presented it publicly at the Budget Workshop & Supervisors Meeting." On June 26, 2009 the OOR invited the Township to supply additional information in support of its denial. On July 3, 2009, Ms. Constable responded on behalf of the Township reiterating its position that the Presentation is not a public record. The Township argues that the Presentation is "one Supervisor's understanding of what was in the proposed budget." It acknowledges that the proposed budget is a public record but that the Presentation "was never provided to the Township in either printed or electronic form, and . . . has been overwritten and therefore does not exist." The Township argues that the Presentation does not meet the section 102 definition of public record because the presentation was not "created, received or retained pursuant to law."

The Township contends that the proposed budget was "'created, received [and] retained' by the Township pursuant to law **and** '[] documents a transaction or activity of the agency,'" (emphasis in original) but that the Presentation was not. Further, the Township asserts that even if the Presentation was considered a public record and "was still in existence, the Township does not have possession, custody or control of that material." It argues that the Township does not have a duty "to produce something under the law that is not and never has been within the Township's possession, custody or control." It added that the Township Supervisor's personal computer was not furnished by the Township and "the Township does not have any control of it nor does the Township compensate that Supervisor (or any other Supervisor) for their use of their own computers."

The Township then argued that section 708(b)(12) exempts the Presentation from disclosure because it is "other material that does not have an official purpose." It refers to the proposed and finally approved budget as the documents that have an official purpose. The Township states that the "request for the subject Power Point material ended when it was made clear that it was not is [sic] the possession of the Township, and never had been." The Township asked the OOR to deny the appeal and recommend that "it be deemed frivolous should a subsequent appeal be filed."

The Citizen requested an opportunity to respond to the Township's assertions and authorized the OOR to extend the date for issuance of the Final Determination to July 30, 2009. The OOR invited the Township to provide a sworn affidavit or affirmation on nonexistence of the record from "Mr. Chantelau or the person who actually erased, deleted, eliminated or destroyed the presentation." On July 16, 2009 the Citizen asserted that "what [the Township] fails to say is that Supervisor Bill Chantelau who gave the power point presentation publicly . . .

was and still is one member of the two member Finance Committee for the board of supervisors.” She provides copies of Supervisor’s Agendas for five different meetings ranging from 2005 through 2009 listing Mr. Chantelau as a Supervisor under the Finance Committee. On July 20, 2009 the Township Solicitor, Walton V. Davis, Esquire, responded on behalf of the Township at the request of the Board of Supervisors as follows:

It is the Position of Mount Joy Township that the ‘invitation’ to submit the affidavit is beyond the scope and jurisdiction of the Right to Know Law. That Law applies, in this case, because the Township is a “local agency” under the Law. The definition of “local agency” does not include individuals, but rather defines a local agency as an “agency, council, board, commission or similar governmental entity.” The Township’s Secretary, who is also the RTK Officer, has control of and access to the Township’s records. She has no power over private persons, such as the elected Supervisors, to require them to either subscribe to affidavits, nor to produce anything from their private files (such as proof that a computer file has been overwritten). Further, we can find nothing in the Law that permits you or anyone in your Office to go beyond the local agency’s records or to require an elected Supervisor to provide any document, such as the affidavit.

The issue before the OOR is whether the power point presentation created by a Township Supervisor on his personal computer and presented at Township meetings is a record “of the Township” that it is obligated to produce, if it exists, despite not having physical possession and not owning the computer on which the presentation was created and stored.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL and required to disclose public records. 65 P.S. §67.302. Records of a local agency like the Township are presumed to be “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a legal privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. The Township asserts that the Presentation sought

in the Request does not qualify as a record “of the Township” because it were created by a Township Supervisor on his own personal computer and was not copied or provided to the Township. In addition the Township argues that even if the Presentation is an agency record it is exempt from disclosure pursuant to section 708(b)(12) as “other materials that do not have an official purpose.” Finally, the Township argues that even if the Presentation is a public record, it no longer exists and the Township is not required to create a record that does not exist.

1. The Presentation Sought In The Request Qualifies As A Record “Of An Agency.”

The Township contends that the Presentation requested by the Citizen does not qualify as a public record because they are not “records,” “of an agency” and do not qualify as records in “possession” of the Township. “Record” is defined as “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*¹ in connection with a transaction, business or activity of the agency.” 65 P.S. §67.102. (emphasis added). On its face, the request seeks information that documents an activity of the Township through one of its Supervisors in connection with business of the Township, *i.e.*, creation of the budget. There is no disagreement that the Presentation was created by a Township Supervisor and presented at Township meetings. The Township's argument that the Presentation is only the result of the “personal view” of one Supervisor has no bearing on whether the Presentation is a record of the Township. Here, the view point of the drafter of the Presentation is that of the Supervisor acting in his position as a public servant of the Township. It was presented at Township meetings while the author was acting in his official capacity as a Township Supervisor. This is not a situation where a private

¹ The OOR notes that in its July 3, 2009 letter in support of its denial the Township relies on the ‘and’ and ignores the ‘or’. The Township implies that the definition in section 102 of “Record” is not met because the presentation was not “created, received or retained pursuant to law.” The OOR points out that the second part of the definition is an OR test, and only one part needs to be met in order for the OOR to find that the Presentation is a record of the Township.

citizen drafts a presentation, allows it to be viewed at a public meeting while maintaining it on his private computer, but does not provide copies, electronically or otherwise to the Township. In that case, the Township's arguments might make sense, but in the situation as presented here, the argument does not. In *Mollick v. Worcester Twp.*, OOR Dkt. AP 2009-0438 (issued July 8, 2009) that Township similarly argued that emails that had been sent and received by Township Supervisors, were not records “of the agency” and could not be deemed to be within that Township’s possession because they were not “copied to the Township.” *Mollick*, p. 9. The OOR found that argument unpersuasive. In *Mollick*, p.9-10, the OOR stated as follows:

The Commonwealth Court recently undertook thorough statutory construction of duties to disclose in the RTKL context under the prior law, 65 P.S. §66.1 *et seq.* (“Old Law”). See *Lukes et al. v. DPW*, 2009 Pa. Commw. LEXIS 452 (June 3, 2009). In *Lukes*, the Court recognized that physical possession of a record is not the litmus test of an agency performing its duties of disclosure, rather it is *control*.

An agency must obtain records from third parties, even if it never had physical possession of the records, in order to meet its statutory duty as part of performing its diligent search and inquiry for responsive records. *Id.* In recognition of the purpose of the RTKL, the Commonwealth Court explained that to permit an agency to relieve itself of responsibility after determining that it does not have physical possession of a record does a disservice to openness. The Court reasoned

While DPW does not, at the present time, physically possess copies of the Provider Agreements, DPW has undeniable access to and can exert control over the Provider Agreements. DPW does not have the right to evade disclosure of public documents by keeping these records with the Health Plan. We, therefore, conclude that the Provider Agreements are "maintained" by DPW and are "records" for purposes of the Law. To conclude otherwise would promote the very mischief the Law seeks to remedy by permitting agencies to place records in the hands of third parties to circumvent disclosure. *Id.* at *29.

The OOR concludes that e-mails of Township Supervisors are within Township control. To conclude otherwise would ignore the reality that the Township Supervisors are a crucial part of the Township and as the *de facto* governing body, may compel themselves to furnish any and all copies of responsive e-mails maintained that pertain to the nominations at issue. The OOR also concludes that the possession or control over records is not dictated by whether the Township funds defray cost of or

provide personal computer service to its Supervisors. Were the non-payment for or non-ownership of computers or computer access to be sufficient to preclude public access to records of an agency, then any agency could conduct its business and activities on private computers or communicate about matters it wants to remain secret via private e-mail accounts.

Just as Supervisor e-mails sent from or to personal computers regarding Township business are public records, so to is a Presentation drafted by a Township Supervisor and presented at Township meetings while acting in his official capacity as a Township Supervisor. The Presentation qualifies as a Township record because it is a record created by a member of its governing body and relates to Township business, the budget. The Presentation must be disclosed absent protection by an exemption. The only exemption cited and argued by the Township is 708(b)(12). Its application is discussed below.

2. The Township Failed to Establish that the Presentation is Protected by Section 708(b)(12).

The RTKL is clear that “the burden of proving that a record of a ...local agency is exempt from public access shall be on the ... local agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Section 708(b)(12) exempts from public disclosure “Notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other material that do not have an official purpose.” The Township contends that the Presentation qualifies as “other materials that do not have an official purpose.” The OOR disagrees. The Presentation was not used “solely” for Supervisor Chantelau’s own personal use. Its official purpose was

made obvious by its use at the Township meetings by the Township Supervisor that prepared it. Therefore, there is no basis for application of Section 708(b)(12).

3. The Township Failed to Establish that the Presentation Does Not Exist

The Township asserts through its Secretary and Right to Know Officer that it was told the record no longer exists. When asked to provide a sworn statement from Supervisor Chantelau affirming the nonexistence of the record, the Township refused, arguing that the OOR had no authority to request an affidavit from a private Citizen. As discussed above, Supervisor Chantelau is not a private Citizen in regard to his relationship with the Presentation. As the Township's Solicitor pointed out, the RTKL applies to the Township because it is a local agency. The Solicitor correctly cited the definition of local agency as an "agency, council, **board**, commission or **similar governmental entity**." (emphasis added). The agendas provided by the Citizen clearly indicate that Supervisor Chantelau is a member of the Mount Joy Township **Board** of Supervisors. The Township does not argue that he is not a member of the Board. An agency is not brick and mortar, it is the people who make up the agency. As a public official Mr. Chantelau is required to produce public records that he maintains whether they are on his personal computer, sitting on his desk at home or in the trunk of his car. The fact that the record was never stored in some building owned by the Township or on some equipment owned by the Township does not control as to whether the record is public. The Township is obligated to acquire those records that are public records of the Township, regardless of where they are maintained, and provide them to requesters. To require otherwise would allow agencies to circumvent the RTKL by maintaining its files on personal computers owned by its officials or employees. The Township failed to acquire the record from Supervisor Chantelau and failed to provide sufficient evidence to meet its burden of proving that the record did not exist. Therefore,

the OOR finds that the record does exist and the Township is required to retrieve it from Supervisor Chantelau and provide it to the Citizen or provide an affidavit on nonexistence from Supervisor Chantelau, as the agency member in control of the record, as sufficient evidence to meet its burden of proving the record does not exist.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted**. The OOR finds that the Power Point presentation created by the Township Supervisor and presented at Township meetings is a record "of" the Township. The OOR also concludes that the Presentation does not qualify as exempt under section 708(b)(12) and the Township has not met its burden of proving that the record does not exist. Accordingly, the Township is directed to procure and provide the Citizen with the requested Presentation within thirty (30) days or provide an affirmation of nonexistence from Supervisor Chantelau.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Adams County Court of Common Pleas. 65 P.S. §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 court rules. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 24, 2009



AUDREY BUGLIONE, ESQ.
APPEALS OFFICER

Sent to: PAMELA ROMAN (COMPLAINANT),
BRENDA CONSTABLE (AGENCY)



pennsylvania
OFFICE OF OPEN RECORDS

July 15, 2009

Pamela Roman
48 Updyke Road
Littlestown, PA 17340

Brenda Constable
Mount Joy Township
902 Hoffman Home Road
Gettysburg, PA 17325

Re: Roman v. Mount Joy Township, Docket # AP 2009-0528

Dear Ms. Constable and Ms. Roman:

I am writing in regard to the appeal referenced above. It has been brought to my attention by Mount Joy Township that the Final Determination contained a typographical error in that it advised the parties to appeal to Lancaster County Court of Common Pleas rather than Adams County Court of Common Pleas. To correct any confusion this may have caused I have enclosed a revised last page of the Final Determination which properly designates Adams County Court of Common Pleas as the appeals court.

Thank you for your attention.

Respectfully,

A handwritten signature in black ink, appearing to read "Audrey L. Buglione".

Audrey L. Buglione
Appeals Officer

cc: Wilson Davis, Esquire, Mount Joy Township Solicitor



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2. The Township Failed to Establish that the Presentation is Protected by Section 708(b)(12).

The RTKL is clear that “the burden of proving that a record of a ...local agency is exempt from public access shall be on the ... local agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Section 708(b)(12) exempts from public disclosure “Notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other material that do not have an official purpose.” The Township contends that the Presentation qualifies as “other materials that do not have an official purpose.” The OOR disagrees. The Presentation was not used “solely” for Supervisor Chantelau’s own personal use. Its official purpose was

made obvious by its use at the Township meetings by the Township Supervisor that prepared it. Therefore, there is no basis for application of Section 708(b)(12).

3. The Township Failed to Establish that the Presentation Does Not Exist

The Township asserts through its Secretary and Right to Know Officer that it was told the record no longer exists. When asked to provide a sworn statement from Supervisor Chantelau affirming the nonexistence of the record, the Township refused, arguing that the OOR had no authority to request an affidavit from a private Citizen. As discussed above, Supervisor Chantelau is not a private Citizen in regard to his relationship with the Presentation. As the Township's Solicitor pointed out, the RTKL applies to the Township because it is a local agency. The Solicitor correctly cited the definition of local agency as an "agency, council, **board**, commission or **similar governmental entity**." (emphasis added). The agendas provided by the Citizen clearly indicate that Supervisor Chantelau is a member of the Mount Joy Township **Board** of Supervisors. The Township does not argue that he is not a member of the Board. An agency is not brick and mortar, it is the people who make up the agency. As a public official Mr. Chantelau is required to produce public records that he maintains whether they are on his personal computer, sitting on his desk at home or in the trunk of his car. The fact that the record was never stored in some building owned by the Township or on some equipment owned by the Township does not control as to whether the record is public. The Township is obligated to acquire those records that are public records of the Township, regardless of where they are maintained, and provide them to requesters. To require otherwise would allow agencies to circumvent the RTKL by maintaining its files on personal computers owned by its officials or employees. The Township failed to acquire the record from Supervisor Chantelau and failed to provide sufficient evidence to meet its burden of proving that the record did not exist. Therefore,

the OOR finds that the record does exist and the Township is required to retrieve it from Supervisor Chantelau and provide it to the Citizen or provide an affidavit on nonexistence from Supervisor Chantelau, as the agency member in control of the record, as sufficient evidence to meet its burden of proving the record does not exist.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted**. The OOR finds that the Power Point presentation created by the Township Supervisor and presented at Township meetings is a record "of" the Township. The OOR also concludes that the Presentation does not qualify as exempt under section 708(b)(12) and the Township has not met its burden of proving that the record does not exist. Accordingly, the Township is directed to procure and provide the Citizen with the requested Presentation within thirty (30) days or provide an affirmation of nonexistence from Supervisor Chantelau.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Lancaster County Court of Common Pleas. 65 P.S. §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 court rules. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 24, 2009



AUDREY BUGLIONE, ESQ.
APPEALS OFFICER

Sent to: PAMELA ROMAN (COMPLAINANT),
BRENDA CONSTABLE (AGENCY)