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July 27, 2018

Via E-mail Only: vkleiner@phillipsburgnj.org

Victoria L. Kleiner, Clerk
Town of Phillipsburg
120 Fillmore Street
Phillipsburg, New Jersey 08865

Re: Meliss Paulus OPRA Request Dated June 27, 2018

Dear Vicki:

Please accept this correspondence in response to Ms. Paulus' OPRA request dated June 27, 2018 wherein she requested the activity log of Mayor Ellis' Facebook page for days June 16 - June 27, 2018. The question is whether the Mayor's Facebook page constitutes a "government record" for purposes of OPRA notwithstanding the fact that the Town of Phillipsburg does not have access to nor does it maintain the Facebook page and notwithstanding the fact that Mayor Ellis has a disclaimer on the page stating that the page is not affiliated with the Town nor is it an official website of the Town.

Helpful in performing the analysis as to whether the Mayor's Facebook page constitutes a government record subject to the provisions of OPRA is the case of Larkin v. Borough of Glen Rock. Larkin involved substantially exactly the same request as Ms. Paulus' which request was denied by the Borough Clerk as the Borough asserted that Facebook pages of the Mayor and Council were not government records due to the fact that the "private accounts (are) not linked to public pages. The Borough does not have custody or involvement so they are not subject to OPRA." The Plaintiff sued.

The Court noted the State's "long standing public policy favoring ready access to most public records" and reiterated that OPRA was created to provide such access to the public and that the public agency bears the burden of justifying a denial. In the absence of such proofs, "a citizen's right of access is unfettered."

As to whether the Facebook page maintained by the Mayor constitutes a government record, it is important to note that Mayor Ellis' Facebook page confines itself to discussions involving the Town of Phillipsburg and the important issues facing it as well as engaging in dialogue with town residents and encouraging residents to contact the Mayor with issues that they may be experiencing in the town. The Court in Larkin held that the Facebook pages

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maintained by the Mayor and Councilman were maintained in order to conduct official business by engaging with their constituents in an official capacity. That, likewise, is the purpose of Mayor Ellis' Facebook page. Also the Court in Larkin noted that, "because the Mayor and Councilman use the Facebook accounts for governmental functions, their control and exercise over the accounts is accordingly governmental in nature."

Equally of importance is the fact that the messages posted on Mayor Ellis' Facebook page constitute a writing stored and maintained electronically for purposes of OPRA and that "the writings were made by elected officials on Facebook pages clearly identifying their status as elected officials and that the Facebook pages were not personal Facebook pages, but rather Facebook pages designed for the sole purpose of posting information regarding the official business of the [Town] and dialoging with constituents in the public at large regarding the business of the Borough of the Town falls clearly within the definition of government record as identified by OPRA".

The fact that the Borough of Glen Rock did not maintain or keep on file the individual Facebook pages was of no import to the Court. The Court noted that the statutory command for OPRA is that it "shall be construed in favor of the public's right of access." In that case, the Court imposed the duty to provide requested information on the elected official maintained if the individual account once defined that account was a government record had been made.

In conclusion, it is my opinion that the Facebook page maintained by Mayor Ellis related to advising the Town of important events and issues faced, as well as interacting with Town residents in his capacity as Mayor, constitutes a government record subject to OPRA. Accordingly, the OPRA request by Ms. Paulus is a valid request and the activity log requested here ought to be provided. If you have any questions, please do not hesitate to contact me.

Very truly yours,



Richard W. Wenner

RWW/yc

cc: Mayor Stephen R. Ellis, via email