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24-ORD-246

November 22, 2024

In re: Eric Bunzow/Elsmere City Councilwoman

**Summary:** A member of the Elsmere City Council (“the Councilwoman”) did not violate the Open Records Act (“the Act”) when she denied a request that did not seek records prepared, owned, used, in the possession of, or retained by the Councilwoman.

***Open Records Decision***

On or about August 31, 2024, Eric Bunzow (“the Appellant”) submitted two requests to the City of Elsmere (“the City”) pertaining to a social media account on Facebook identified as “Councilwoman Serena Owen.” First, he requested “a copy of any and all Facebook messages between” that account and nine named individuals. Second, he requested “a copy of any and all Facebook people that are blocked on” that account. Upon receipt of the requests, the City forwarded them to the Councilwoman<sup>1</sup> and asked her to provide the requested records to the city clerk because “the City is not in possession or control of the account.” The Councilwoman responded that there were no records responsive to the Appellant’s requests.<sup>2</sup>

On or about October 11, 2024, the Appellant made a third request to the City for “a copy of the activity log or a public inspection of the activity log” for the Facebook account “Councilwoman Serena Owen.” The City forwarded the request to the Councilwoman, who replied that that she would not comply because the Facebook page was “a personal political candidate page and not a government operated page” and, therefore, “is not subject to” the Act. This appeal followed.

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<sup>1</sup> Serena Owen is a member of the Elsmere City Council.

<sup>2</sup> The City’s original response indicates that the Appellant also sought copies of the Councilwoman’s paychecks. However, the Appellant did not submit a copy of his request for paychecks to the Office. Rather, he submitted the agency’s response, which quotes that request. Because the Appellant did not submit a copy of his original request for the paychecks, the response to that request is not before the Office on appeal. *See* KRS 61.880(2)(a).

The Councilwoman did not submit a response to this appeal. Thus, the Office refers to the Councilwoman's original denial, stating her "personal Facebook page is not subject to" the Act. KRS 61.870(2) defines "public record" to include "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." A record is a "public record" if it is the property of a public agency. *See* 24-ORD-118. A record is the property of a public agency, and is therefore a "public record," if the agency owns, possesses, or retains it. Further, a record can become the property of a public agency if it is used or prepared by the public agency for an official purpose. *See, e.g.,* 23-ORD-057 (holding a picture on a police officer's personal cell phone became a public record when he used it to obtain a witness's identification of a suspect that was later used to secure a search warrant). Because communications on web-based social media accounts are stored on the social media provider's website and are merely accessed by its users through a web browser or mobile application, they are not "owned" or "possessed" by a user. *See, e.g.,* 15-ORD-190 (finding the Kentucky Department of Education did not own or possess emails stored on local school district-owned servers even though the Department had an administrative password that permitted the Department to access the local district's emails). Nevertheless, social media communications may be "prepared," "used," or "retained by a public agency" within the meaning of KRS 61.870(2). *See* 22-ORD-184.

The definition of "public agency" under the Act includes "[e]very state or local government officer." KRS 61.870(1)(a). Thus, the Councilwoman is a "public agency" by virtue of her office. But whether a social media account belonging to a government officer is the account of a "public agency" can be a fact-intensive inquiry. *See* 22-ORD-184 n.3. "[M]any public officials use both a 'personal' account and an 'official' account[, and] accounts not in the possession of a [public] agency or for the work [of] government, including personal accounts, are just that: personal accounts not subject to the Act." *Id.*

In 22-ORD-184, the social media account at issue was a Twitter account titled "KY Secretary of State Michael Adams," which was embedded on the homepage of the Secretary's official website. Because the account bore the Secretary's official title and was embedded on a government website, the Office found the Secretary "prepared," "used," and "retained" the posts "in his official capacity as a state officer," making them public records. *Id.* Here, by contrast, the Councilwoman's Facebook page bears her official title but is otherwise described as a "personal page." Moreover, there is no evidence that it is embedded in or otherwise linked to any government website. Likewise, there is no evidence that the account has been used by the Councilwoman in her official capacity, although it indicates it is a "political candidate" page and the account bears the Councilwoman's title. But the account also makes clear that it is a

personal page intended to facilitate her communications as a political candidate. The Office concludes that such an account is not “prepared,” “used,” and “retained” by the Councilwoman “in [her] official capacity as a state officer,” making its contents a public record. *Id.* Accordingly, the Councilwoman’s Facebook account is not subject to the Act, and so she did not violate the Act when she denied the Appellant’s October 11 request.<sup>3</sup>

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

**Russell Coleman**  
**Attorney General**

/s/ Zachary M. Zimmerer  
Zachary M. Zimmerer  
Assistant Attorney General

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Distributed to:

Eric Bunzow  
Serena Owen

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<sup>3</sup> Because the Councilwoman’s personal Facebook account is not subject to the Act, it is not necessary to address her assertion that no records responsive to the Appellant’s August 31 request exist. Even if such records did exist, they are not public records subject to the Act.