

# Pennsylvania Right-to-Know Law and Sunshine Law: Guide for Elected Officials

PRESENTED BY: KILKENNY LAW, LLC.

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# WHAT WE INTEND TO DISCUSS

- RTKL process basics (refresher)
- Practical Tips (or reminders)
- Select Topics from Practical Experience (that may be of interest)

# BASICS:



The Right-to-Know Law allows for any person to request from a municipality any public record, legislative record or financial record.

However, even if a record is a public record, it can still be withheld under certain exemptions.

Many items that you would not think about are considered public record – for example, text messages, handwritten notes and call logs can be deemed public record under Right-to-Know.

# PRACTICE TIP:

## What do you mean by “Valid Request?”

- ▶ **RTKL requires that:**
- ▶ (1) Request be submitted by a “legal resident (or an agency) of the United States,” (see §102);
- ▶ (2) Request must be written in order to trigger any appeal rights, (see §702);
- ▶ (3) Request cannot be anonymous, (see §702);
- ▶ (4) Request must be for records and cannot be used to ask questions, (see Walker v. Pa. Ins. Dep’t, No. 1485 C.D. 2011, 2012 Pa Commw. Unpub. LEXIS 425 at \*16 ( Pa Cmwlth 2012) (stating “the RTKL is not a forum for the public to [request] answers to specifically posed questions ... . In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request.”));
- ▶ (5) Request must be directed to your agency!



# PRACTICE TIP:

## Common Exemption Issues

### **Cell Phones:**

While “home, cellular or personal telephone numbers” are exempt as “personal identification information,” see §67.708(b)(6), the telephone records may not be exempt and require redaction to show any calls relating to agency business, Paint Twp. v. Clark, 109 A.3d 796 (Pa. Cmwlth 2015).

You should assume that any text message you send regarding municipal business could be subject to Right-to-Know and be required to be provided in response to a request.

In practice, this tends to happen if there is a controversial meeting or a meeting that garners a lot of public interest. Sometimes individuals will request records, including text messages, from elected officials regarding those topics. If the topics do not fall under one of the exemptions, then these must be turned over to the resident.

# PRACTICE TIP:

## Common Exemption Issues

### **Emails:**

The location of the emails (i.e. home computer vs. work computer or work email vs personal email) does not dictate whether it is a record or public record.

Individual emails from an elected official to a developer from a personal email address may not be a record if it has not been ratified, adopted or confirmed by the municipality. In Re. Silberstein, 11 A.3d 629 (Pa. Cmwlth 2011).

Emails between an elected officials regarding the municipality's business is a public record subject to a RTK request, unless otherwise exempt under the law. Mollick v. Twp of Worcester, 32 A.3d 859 (Pa. Cmwlth 2011); Barkeyville Borough v. Sterns, 35 A.3d 91 (Pa. Cmwlth 2012).

Emails stored on non-agency devices are still considered constructively possessed by the municipality and must use good faith efforts to obtain the information. Sterns, supra.

Similar to the cell phone use, you should assume that every email you send is subject to the Right-to-Know Law.

While some emails may be redacted (if they involve internal deliberations regarding a proposed ordinance, resolution or policy), most records do not fall under one of the exemptions.

These emails cannot be withheld but may be redacted.

Additionally, just because you are emailing with your solicitor or your solicitor is copied on an email, that email is not necessarily attorney-client privileged and may still be subject to Right-to-Know.

# PRACTICE TIP:

## Common Exemption Issues

### Attorney Client/ Attorney Work Product Privilege

- “The attorney-client privilege protects **communication made for the purpose of obtaining or providing professional legal advice**, regardless of whether that communication traveled from attorney to client or client to attorney. The privilege protecting communication made for the purpose of obtaining or providing professional legal advice extends to the agency setting where attorneys are working in their professional capacity. The party asserting the attorney-client privilege must set forth facts showing that the privilege has been properly invoked.” Heavens v. Pa. Dep't of Env'tl. Prot., 65 A.3d 1069, 1076, (Pa. Commw. Ct. 2013).

“The work-product doctrine offers **broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties**, particularly in anticipation or prevention of litigation.. Like the attorney-client privilege, under the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked. Heavens, supra.

However, it is important to remember that many communications with your attorney will not be considered either attorney-client privilege or work product doctrine and will therefore not be subject to any exemption.

If you are concerned about whether a topic would be protected, please ask your solicitor. Additionally, you can always call to discuss a matter.

# Selected Topic

## Hypothetical 1: Draft Policies

A Municipal Department Head has an idea to address a concern relating to the Department Head's department.

The Department Head prepares a memo proposing a legislative action or policy for the elected body to adopt.

The memo was shared with the elected body but no further action was taken (i.e. never discussed, never listed on any agenda).

A request was made for a copy of the proposed policy.

Is the draft policy subject to the RTKL?





# Selected Topic

## Hypothetical 2: Outside Investigation



Your Municipality hires an outside professional to perform an investigation of one of the Municipality's departments.

The investigation involves interviewing all department employees, reviewing all existing department practices and policies, and a physical inspection of the department's facility and equipment.

The professional issues a report that contains both recommendations and factual findings.

A department employee requests a copy of the report.

Is the report subject to the RTKL?

# Selected Topic

## Bad Faith

Brunermer v. Apollo Borough, 2022 WL 2976345 (Pa Cmwlth 2022) (unpublished)

“Agencies have a mandatory duty to conduct a good faith search for records sought pursuant to a RTKL request. “

“... bad faith does not require a showing of fraud or corruption by the agency; a lack of good faith compliance and failure to meet the mandatory duty of disclosure may rise to the level of bad faith without a showing of intent to withhold information. Failing to perform a search until a matter is in litigation, which may be shown by the existence of responsive records that later come to light, may also constitute bad faith.”

“[B]ad faith is a matter of degree, implicating the extent of noncompliance,” and the reviewing court (either the trial court or this Court) has the exclusive authority to find facts and impose sanctions in this regard.”

“... when an agency has shown some diligence to respond to a request and nondisclosure is due to a genuine and nonfrivolous belief that documents have been provided, are unavailable, or are not subject to disclosure, we have declined to impose or uphold penalties.”

# Sunshine Act (Open Meetings Law)

- The Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701-716, requires agencies to deliberate and take official action on agency business in an open and public meeting. It requires that meetings have prior notice, and that the public can attend, participate, and comment before an agency takes that official action

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# Updates to Sunshine Act:

- The Sunshine Act was amended by Act 65 of 2021 providing new requirements for publishing and posting public meeting agendas and new restrictions on when public bodies may vote on at meetings on matters not listed in the published agenda. These amendments were made effective August 29, 2021.
- The amendments do not apply to executive sessions, conferences, or certain working sessions.

# New Publishing Requirements

- Prior to the amendment, the Sunshine Act only required that notice of a public meeting be given.
- Now, each Municipality is required to post meeting agendas on its website at least 24 hours prior to the meeting.
- The agenda is required to contain a listing of each matter that will be or may be the subject of deliberation or official action at the meeting. In addition to posting the agenda on the website, the agenda shall be physically posted at the main business office and the physical location of the meeting. Copies of the agenda shall also be available for attendees of the meetings.

# BOARD'S LIMITED ABILITY TO ACT ON NON-AGENDA ITEMS

If an item is not on the agenda 24 hours prior to the meeting, Board's ability to add it is limited and requires certain steps to be taken. First, the Sunshine Act amendments limit which types of matters may be deliberated/voted on if not on the agenda. They are matters:

- A. To address a real or potential emergency that involves a clear and present danger to life or property,
- B. To address a matter of Township business that only arose or was brought to the Board's attention within 24 hours of the meeting, and the matter is "de minimis" in nature and does not involve the expenditure of funds or entering into a contract or agreement, or
- C. To address a matter raised during the meeting by a resident or taxpayer. In this case, Board may:
  - 1. refer the item to staff for the purpose of researching the matter for inclusion at a future meeting, or
  - 2. if "de minimis," and does not involve the expenditure of funds or entering into a contract or agreement, Board may take action on the matter at that meeting.

# Penalties for Violation

- A. If a legal action is filed within 30 days of a meeting which was open or within 30 days of discovery of a meeting which was not open, the court may enjoin the challenged action and invalidate it.
  
- B. Any member of Board who participates in a meeting with the intent and purpose of violating the Sunshine Act commits a summary offense and shall, upon conviction, be sentenced to a fine ranging from \$100 to \$2,000, if prosecuted.



# Warrington supervisors admit to Sunshine Act violation

- Four Warrington Township Supervisors admitted to violating the Sunshine Act in 2016 when they admitted to voting by email to hire a management consultant, and then later took a second vote at a public meeting.
- The DA's office declined to prosecute, mainly because the DA found that the actions were not "nefarious" and further, that the Supervisors followed up the email vote by a public vote.
- The DA DID make an example by having a press conference to underscore their mishandling of the law.

# Appointments/Hiring of Family Members

- Issue: I am on the Board and my family member would like to apply for a position in the Township or be appointed to an unpaid position. Can they be hired/appointed if they are the most qualified?
- YES, however
  - Board member should abstain from voting to hire or appoint, even if the position is unpaid

Social Media  
and Elected  
Officials



# Practical Guidance

- Elected Official's Facebook page *can* be subject to RTK request, depending on the content of the page
- *Schultz v. Montgomery County*, AP 2020-1280, the OOR concluded that the records requested of a County Commissioner's account were records of the County because the social media account contained discussions and posts regarding activities of the Commissioner, in his capacity as the County Commissioner
- *Purdy v. Chambersburg Borough*, AP 2017-1229, the OOR concluded that a Facebook page was a record of the Borough because it was listed on the Borough's official website and contained the link "Find the Mayor on Facebook." In addition, the page contained discussions and posts regarding activities within the Borough, including those relating to the police department and councilmembers, and contained contact information for the Borough. Accordingly, the OOR held that requested Facebook posts and associated comments, including messages sent via Facebook messenger, were subject to public access.

# Social Media Pitfalls

- Personal FB page should not identify elected official in capacity of that position
- Do not discuss Township Business on personal page
- Do not engage in discourse on FB Messenger regarding Township Business
- Keep in mind that if you do discuss Township business, you are creating a public record, and you should assume it is discoverable
- Be cautious about deleting comments or blocking users from your social media account.

# The Right to Petition Government

## Mirabella v. Villard

- Montgomery County case where there was a neighbor dispute over maintenance and use of Township property
- At issue was a Township official's statement to the residents not to communicate with Township officials or employees after the residents' were perceived to have threatened suit against the Township for its inaction in a dispute with the residents' neighbors.
- Walsh, who was chairman of the board, responded with an email that said:  
"Please direct all further communications to the Township attorney. Please never contact me, the Board of Supervisors or the Township employees directly. Do not call me at work, email me at work or speak to me in public or private."

# Mirabella v. Villard

- The Mirabellas filed a civil rights suit against the Township and members of the Board of Supervisors for alleged violations of their First Amendment rights to free speech and to petition the government for redress of grievances. The District Court dismissed all of the Mirabellas' claims except for their First Amendment claims against Walsh and McDonnell, and denied Walsh and McDonnell qualified immunity.
- On appeal, the Third Circuit said the "no contact" email infringed the plaintiffs' constitutional rights, but that the right had not been "clearly established" in the law at the time.

QUESTIONS?

THANK YOU FOR YOUR ATTENTION  
AND PARTICIPATION

