



LOCAL GOVERNMENT ACADEMY
Promoting Excellence in Local Government

Public Access to Personal Social Media and Email Accounts

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A Firm Commitment to You

Presenters



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Learning Objectives

The learning objectives of this presentation are to assist you in...

- Understanding the criteria used by OOR in the enforcement of the Right to Know Law as it relates to personal vs. public social media and email accounts
- The importance of maintaining professionalism in all communications based on a greater awareness of what may or may not be considered a public record
- Implementing best practices to protect you, the municipality and others from the hazards of social media

Topic Importance

Why is this an important topic?

- Social media posts and personal email accounts of elected officials and municipal employees may be open to the public under the Right to Know Law (RTKL).
- Many times, elected officials and municipal employees have the mistaken belief that the public has no right to see these communications.
- OOR and the Courts have a different view.

Statistics

- Pennsylvania has roughly 2,560 municipal governments.
- National studies of local governments consistently show about 80-90% have at least one official social media account.
- Only 19% of those Pennsylvania municipalities have written policies for social media.
- The OOR reports that social media RTKL cases are a growing subset of appeals
 - WHY?

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Statistics

Why the number is growing

Requests about municipal social media have increased due to:

1. Government communication shifting to Facebook
2. First Amendment litigation involving social media pages
3. RTKL requests for deleted posts or comments
4. Requests for messages sent through Facebook or Instagram

These issues intersect with:

- public record retention
- comment moderation
- blocking users
- archiving posts.

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Triggers

- Personnel decisions.
- A Union which makes unreasonable demands.
- Tough budget decisions.
- Controversial ordinances.
- Zoning issues.
- Reduction in services.
- Unfunded mandates.



What if...

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Overview of the Law



Access and Disclosure

Access and Disclosure is governed by two statutes:

- Pennsylvania's Right-to-Know Law
- Rule 34 of the Federal Rules of Civil Procedure and Rule 4009.1, et seq. of the Pennsylvania Rules of Civil Procedure



Public/Private Determination

Is it a public record?

Does the record pertain to official business?

Are there any exceptions?

Public Records

Are the documents Mrs. Smith requested public records?

“Public record” is defined as:

A record of a local agency that:

1. is not exempt under Section 708;
2. is not exempt from being disclosed under any other federal or state law or regulation or judicial order or decree; or
3. is not protected by a privilege

Records

“Record” is defined as:

- Information, **regardless of physical form or characteristics**, that documents an agency transaction or activity and is created, received or retained pursuant to law or in connection with an agency transaction, business or activity, including: a document; paper; letter; map; book; tape; photograph; film or sound recording; **information stored or maintained electronically;** and a data-processed or image-processed document.

Email, Text, Tweets, & Social Media Posts

Fall within the definition of “record”

Are presumed to be “public records” unless:

- Covered by 1 of the 30 exceptions
- Protected by a privilege
- Protected by Federal or State law

So, YES, the documents Mrs. Smith requested ARE public records.



Penncrest School District v. Cagle

- A Right to Know Law request was submitted for school board members' social media posts on private Facebook accounts.
- The case was argued in front of the State Supreme Court
- The Court upheld the framework found in the Right to Know law:
 - Does the Post Document Agency Activity?
 - Was the Post Created in an Official Capacity?

Penncrest School District v. Cagle

- Key Takeaways:
 - The focus is on the content of the post, not what the account looks like
 - Labels like “official,” “personal,” or “campaign” are not controlling by themselves.
 - Courts must examine whether each post deals with actual government business and whether it was posted in connection with the official’s role.

Penncrest School District v. Cagle

- Additional color from Commonwealth Court case:
 - RTKL defines a "record" as information that documents a transaction or activity of an agency that is created/received/retained in connection with that transaction or activity, meaning that posts about personal matters will not generally fall under this definition.
 - In this case and others, the OOR contemplates whether an account has the "trappings" of an official agency page (official titles, announcements, etc.), whether the contents of the posts reflect agency transactions or activity, and whether the posts were made in an "official capacity."
 - "Trappings" in this case may include the public or private setting of the account, the use of official titles, the nature of the posts, or the general appearance of the account.
 - Posts that are merely informative without addressing conduct and performance of a government body may not reflect agency activity.

Right to Know Law (RTKL)

Do the Records Mrs. Smith requested fall within an exception under the RTKL?

30 Exceptions

- The two primary exceptions are:
 - Pre-decisional deliberations;
 - Personal notes and working papers.

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RTKL – Additional Exceptions

- Personnel related
- HIPAA protected
- Privacy interest in names and addresses
- Attorney client privilege

Redacting Information



Even if the document must be produced, certain information may be redacted.



What if...

Mrs. Smith stands up at the meeting and shouts,

“I know you were texting each other about me – I want to know what you were saying!”

You start thinking that it might be a good idea to delete the texts you sent Francine Jones.

Destroyed or Lost Posts

What are the consequences if an e-mail, text, tweet or social media post is destroyed or lost?

- A municipality is not required to create a record which does not exist and is not required to compile, maintain, format or organize a record in a manner which the municipality does not currently use.



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Municipal Business

For Mrs. Smith to have the right to the documents she requested, **we must understand what is considered municipal business**



Municipal Business

- Does the material document a “transaction or activity of the agency”
- If so, was the material “created, received or retained... in connection with a transaction, business or activity of [an] agency.”

Awareness of When the Public May Access Personal Social Media and Email Accounts



Case Study One

- Someone requests copies of all Facebook posts (including deleted posts) from a Borough Mayor's Facebook page that relate to a specific community project including any emails sent from the Mayor's email accounts.
- The Borough provides the requested emails but denies records relating to the Mayor's Facebook page on the basis that it was his private account and the posts were not "records."
- The requester appeals the Borough's decision.
- **Does OOR order the Borough to produce the documents?**

Case Study One

YES.

- OOR determined that it was “immaterial whether or not the Borough has oversight over the Facebook page or authorized the Mayor to maintain such an account.”
- “It also is immaterial that the Borough’s computer network blocks the use of Facebook.”

Case Study One



“The Facebook page subject to this appeal is listed on the Borough’s **official website** and contains the link “Find the Mayor on Facebook.”

The Mayor’s Facebook Page states, “Public Figure Chambersburg, Pennsylvania.”

The page contains discussions and posts regarding activities within the Borough, including those relating to the police department and councilmembers, and contains contact information for the Borough.

Purdy v. Borough of Chambersburg, OOR Docket No. AP 2017-1229

Case Study Two

- Requester sought the records of a County Commissioner's social media accounts, including a list of blocked accounts, the content of private Twitter and Facebook discussions, and a list of all posted messages, including deleted ones.
- The County denied the request, stating that the accounts were private social media accounts and that posts were not a record of the county.
- **Did the OOR order the County to produce responsive documents?**

Case Study Two

- YES.
- OOR held that the records of the account contained discussions and posts regarding activities of the Commissioner, in his capacity as Commissioner. Accordingly, there were no appropriate exemptions and the records were subject to public access.
- The OOR further held that it was immaterial whether or not the County had oversight over the pages, rather they looked at whether it was used as a significant platform by an elected or employee to conduct or discuss official business.
- Schultz v. Montgomery County, OOR Docket No. AP 2020-1280

Case Study Three

- Someone requested records related to a School Board Director's Facebook post stating that the Board took action regarding a Senate Bill relating to educational savings accounts.
- The request sought records of personal Facebook postings, and personal emails of Board members discussing the action taken.
- The District granted part of the request, but denied the request to the extent that the District redacted personal information, internal pre-decisional deliberations, and privileged information.
- The requester appealed.
- Did OOR order the District to produce all of the documents requested?

Case Study Three

NO.

- OOR denied the Requester's appeal. OOR held that the District's Open Records Officer had conducted a good-faith effort to locate the records.
- The good-faith effort consisted of conducting an email search and requesting information from each Board member. In support of this assertion, the District provided affidavits from numerous individuals.
- In addition, OOR held that some of the exempted records were internal, pre-decisional deliberations of the Board.
- The District was able to show this by having its affiants indicate that the requested information related to the deliberation of a particular decision.
- Chirico v. Cheltenham Township School District, Docket No. AP 2018-0484

Case Study Four

- Someone requested records of communications to/from Commissioners for specific dates regarding particular topics, including commissioners' personal email and text messages.
- The municipality denied the Request.
- The requester appealed.
- **Did OOR order the municipality to produce the documents requested?**

Case Study Four



YES/NO.

- The appeal was granted in part and denied in part.
- The appeal was denied to the extent that the agency produced an affidavit from a Commissioner indicating that the communications that would have fallen within the scope of the Request were between the Commissioner and a member of the public.
- Pursuant to the case of In re Silberstein, 11 A.3d 629 (Pa. Commw. 2011), communications between a single official and a member of the public may not constitute records and are not subject to disclosure if they do not involve agency business.
- The appeal was granted as to any records between other elected officials that were created with the purpose of furthering agency business.
- Gillen v. Mt. Lebanon, Docket No. AP 2014-0676

Case Study Five

- Someone requested records, for specific dates, the Internet Browsing History of all township-owned desktop or laptop computers.
- The Township denied the Request.
- The requester appealed.

Did OOR order the Township to produce the documents requested?

Case Study Five

YES.

- The requestor's appeal was granted. OOR held that the Township did not provide a sufficient factual basis to withhold the redacted information.
- The Township failed to "provide any factual details that would allow OOR to determine that the redacted information only reflects personal matters and not transactions or activity of the Township."
- Grove v. Gregg Township, Docket No. AP 2018-1289

Case Study Six

- The same requester from Hypothetical #5 submitted a similar request to a school district for the Internet Browsing History of the Superintendent and Assistant Superintendent to include dates and times of all granted and redacted entries and to include all devices used for District business.
- The District denied the Request.
- The requester appealed.

Did OOR order the District to produce the documents requested?

Case Study Six

YES/NO.

- OOR granted the appeal in part and denied it in part. OOR granted the Requestor's appeal to the extent that the requested records did not qualify as internal, pre-decisional deliberations.
- Additionally, the OOR held that the requested URLs did not provide specific information related to an employee.
- Grove v. Penns Valley Area School District, Docket No. AP 2018-1343

Case Study Seven



- Requester sought email and text communications sent to or from various school board members, vendor related communications, and emails of the school board president regarding postings on social media.
- The district denied the request, stating that the documents showed the identity of a minor, and were protected by attorney-client privilege and the right to privacy. Requester appealed.
- **Did the OOR order the County to produce responsive records?**

Case Study Seven



NO.

- OOR denied the appeal, finding the redaction of personal email addresses and minors' names to be proper under the right to privacy.
- OOR also found that certain records were properly withheld due to attorney-client privilege, as they related to facts privately communicated for the purpose of securing an opinion of law.
- Relying heavily on affidavits to support the redactions that occurred.
- Timothy Daly v. Council Rock School District, Docket no. AP 2024-0623

Case Study Eight

- Requester sought a full download of all activity on a Township supervisor's Facebook page over a specified timeframe, claiming that the page was used as a "portal to discuss Township business."
- Township denied the request, claiming that the responsive records were not in possession, custody, or control of the Township. Requester appealed.
- **Did the OOR order the Township to produce responsive records?**

Case Study Eight

NO.

- OOR found that the Cagle standard was not met, as a Township Supervisor alone does not have the authority to bind the Township through social media.
- Additionally, they found no evidence that the Township had knowledge of or at any point adopted or confirmed the Supervisor's posts, nor were any posts made in an official capacity of the Township.
- Michael Stouffer v. Jackson Township, Docket no. AP 2024-2312

Case Study Nine

- Someone requested all records relating to a Mayor's Facebook activity, on an account used as the sole means of communication between the Mayor and his constituents.
- Borough denied the request, arguing that the records requested did not document a transaction, business or activity "of the Borough." Matter tried in Common Pleas Court.
- **Did the Court order the Borough to produce responsive records?**

Case Study Nine

YES/NO.

- The Court granted the request in part and denied it in part.
- The Court asserted that not all postings on the account were "public records," as they could also be used to communicate personal information not related to the Mayor's work. However, all posts that reflected a transaction or activity as Mayor needed to be disclosed.
- [Wyoming Borough v. Robert Boyer, Docket no. AP 2018-11423](#)

Tips for Email and Social Media Use

BEST PRACTICES INCLUDE:

- Preferably, only use email accounts issued by the municipality or municipal sponsored social media (Facebook/Twitter) to discuss municipal business.
- If your municipality has not already done so, adopt a policy to clearly state that the municipality's sponsored social media (Facebook/Twitter) are limited forums.
- Work with municipal IT staff, if applicable, to ensure that comments for postings are disabled.
- Limit use of municipality's name or logo to identify other sites.
- Use common sense when sending email or posting to social media.
- Consider who will see, and who could potentially gain access to your email and social media posts.

Tips for Email and Social Media Use

DO NOT:

- Use personal email or social media accounts to engage in municipal business. If your municipality does not provide an email address or social media account, follow the above recommendations for the use of your personal accounts.
- Post inappropriate, vulgar or obscene language or materials.
- Send texts, emails or any other types of messages through any means which you would not want the rest of the world to read.
- Engage in deliberations of municipal business with a quorum of members via email or social media communication.
- Say anything you would be unable to defend in front of a judge or jury.

Tips for Email and Social Media Use

CONSIDER THE FOLLOWING:

- Would you send the same email or make the same social media post if your significant other, mother or child were the recipient?
- Would you want your email or social media post to be the subject of a report on the evening news?
- Would you want to defend your email or social media post in a legal proceeding in front of a judge or jury?





**TOP
TIPS!**

Takeaways

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Presentation Takeaways



- A governmental entity “operate[s] through its elected representatives.”
- It is not the forum that matters, it is the content.
- Elected officials must recognize that they are always representing the municipality when discussing municipal business.
- Elected officials should maintain a high level of professionalism and truthfulness in all electronic and social media communications.
- Any electronic or social media communications discussing municipal business, could be subject to disclosure under the RTKL, subject to appropriate redaction.
- It is likely that OOR or the Courts will err on the side of the Requester in deeming something to be a “record.”



What About You?

Do you have any skeletons in your closet?



Questions

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Thank you!



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