



Public Access to Social Media Posts and Personal Email Accounts

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Presented By:

Michael L. Brungo, Esq.

Falco A. Muscante, Esq.

Michael T. Korns, Esq.

Peter J. Halesey, Esq.

PRESENTERS



Michael L. Brungo, Esq.
Partner



Falco A. Muscante, Esq.
Partner



Michael T. Korn, Esq.
Senior Counsel



Peter J. Halesey, Esq.
Associate

LEARNING OBJECTIVES

- The learning objectives of this presentation are to assist you in...
 - Understanding the criteria
 - Developing a greater awareness
 - Implementing best practices

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.

TRIGGERS

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

WHAT IF...





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 the e-mail, text, tweet, or social media posts
 - Are covered by 1 of the 30 exceptions
 - Are protected by a privilege
 - Are protected by Federal or State law
- **So, YES, the documents Mrs. Smith requested ARE public records.**



RIGHT TO KNOW LAW (RTKL)

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

- Exceptions to “Public Record” Definition
 - RTKL contains 30 exceptions. The two primary exceptions are:
 - Pre-decisional deliberations;
 - Personal notes and working papers.

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.



MUNICIPAL BUSINESS

MUNICIPAL BUSINESS

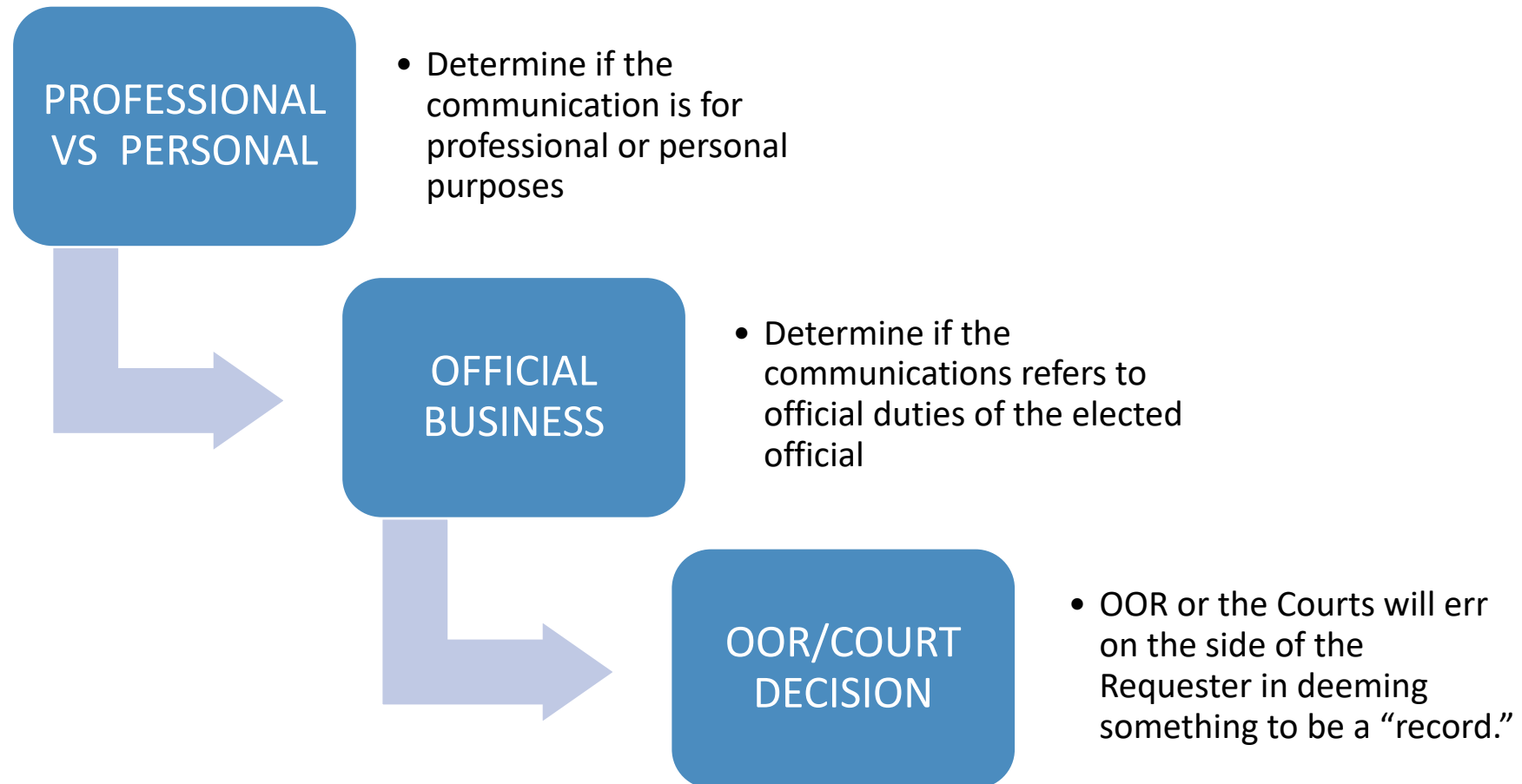


- For Mrs. Smith to have the right to the documents she requested, **we must understand what is considered municipal business**

MUNICIPAL BUSINESS

- To determine if certain material is a record, the RTKL imposes a two-part inquiry:
 - 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.”

MUNICIPAL BUSINESS: IS IT A RECORD?



MUNICIPAL BUSINESS: PROFESSIONAL VS PERSONAL

- Professional vs Personal
- OOR and the Courts look at whether the content of the social media page shows that it is used as a “significant platform” by an elected official to conduct “official business.”
- The term “significant platform” is not specifically defined, and most likely would have to be analyzed on a case by case basis.

MUNICIPAL BUSINESS: OFFICIAL BUSINESS

- OOR looks to the statutorily codified “powers and duties” of an elected official when determining if the social media postings constitute “official business” of the governmental entity.
- In the case of the elected officials of a municipality, the applicable municipal codes and home-rule charters identify the powers and duties of elected officials.
- These include, among an extensive list, the powers of taxation, the enactment of ordinances, (including barking dog ordinances), and personnel oversight.

MUNICIPAL BUSINESS

- Other Sections of the applicable municipal codes discuss additional powers of elected officials.
- Any matter that would appear on a municipality's Meeting Agenda could be considered municipal business. **What if final adoption of a barking dog ordinance was on the Agenda?**
- It is safe to assume that personal email, texts or tweets of elected officials or social media postings touching on any of these broad topics could be construed as "municipal business."



AWARENESS OF WHEN THE PUBLIC MAY ACCESS PERSONAL SOCIAL MEDIA AND EMAIL ACCOUNTS

HYPOTHETICAL ONE

- Someone requested copies of all Facebook posts (including deleted posts) from a Borough Mayor's Facebook page that relate to a specific community project.
- In addition, this person requested any emails sent from the Mayor's email accounts and any Facebook Messenger messages related to the community project.
- The Borough provided the requested emails but denied 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 appealed the Borough's decision.
- **Did the OOR order the Borough to produce the documents?**

HYPOTHETICAL 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.”

HYPOTHETICAL 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

HYPOTHETICAL TWO

- Someone requested the following information from the Facebook page of a Borough Mayor:
 - Contact information of page administrators,
 - Emails sent to the Facebook Page,
 - Comments made and removed or blocked from the page, and
 - Printouts of all posts made to the page and “liked” by the administrator or editor, among other items.
- The Mayor’s Facebook Page identified him as the Mayor of the Borough and indicated that the Mayor was a “Public Figure.”
- The Borough denied the request in full, claiming that the Facebook Page did not belong to the Borough.
- The requester appealed.
- **Did the OOR order the Borough to produce the information?**

HYPOTHETICAL TWO

- **YES.**
- OOR determined that the Facebook page was a record of the Borough, citing Purdy. One difference, no indication that the Mayor's Facebook Page was linked to the Borough's website.
- This decision seems to expand the scope of "record" regarding Facebook pages.
- OOR directed the Borough to provide responsive records within thirty days.
- Boyer v. Wyoming Borough, OOR Docket No. AP 2018-1110

HYPOTHETICAL THREE

- Someone requested all Facebook Comments related to several Facebook posts on a School District's Facebook Page.
- The School District denied the request, stating that comments from the public were not records of the School District.
- The requester appealed.
- **Did the OOR order the District to produce the comments?**

HYPOTHETICAL THREE

- **NO.**
- OOR held that comments from the public were not records of the District.
- The School District provided policies stating its Facebook page is not intended to be used as a public forum, and further presented sworn affidavits of District officials detailing the lengths the School District goes to delete or hide public comments that make it past the District's filter settings.
- It is not clear how OOR would rule if a governmental entity did not have such a policy or if a requester showed that the agency permitted its Facebook page to be used as a public forum.
- Grove v. Penns Valley Area School District, OOR Docket No. AP 2018-0754

HYPOTHETICAL FOUR

A School Board Member reads a position statement related to another School Board Member's Facebook posting.

- Someone requests:
 - The Facebook History of the other School Board Members;
 - Email records, phone records, and Facebook messages between Board Members, legal counsel, and citizens;
 - A listing of all 'Blocked Users' for each individual Board Member's Facebook account; and
 - A copy of the above-referenced position statement.

HYPOTHETICAL FOUR

- The Board only released a copy of the position statement and denied the other requests, stating that those records reflect the members' private social media activity, and further claimed that the withheld records were protected from public disclosure pursuant to the attorney-client privilege and the attorney-work product doctrine and were the internal, pre-decisional deliberations of the District.
- The requester appealed.
- **Did the OOR order the School District to produce the documents?**

HYPOTHETICAL FOUR

- **NO.**
- OOR held that Facebook information was not a record. Distinction between this case and Hypotheticals 1 & 2 is that OOR found that the Board Members “only maintain personal Facebook pages and do not hold themselves out as commenting as school board members.”
- “Although [one member] has indicated that he has been contacted by District residents on Facebook messenger...the contents of the communications he received have not been shared with the school board, nor has he relied upon any of the information he has received.”

HYPOTHETICAL FOUR

- Also, OOR held that certain requested records were properly exempted under the pre-decisional deliberation exception. OOR accepted this argument for some of the records.
- However, it disagreed with the School District's position where it did not allege that the records "did not contain the act of carefully considering issues and opinions."
- Chirico v. Cheltenham Township School District, OOR Docket No. AP 2018-0391

HYPOTHETICAL FIVE

- 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?**

HYPOTHETICAL FIVE

- **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

HYPOTHETICAL SIX

- 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?**

HYPOTHETICAL SIX

- **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

HYPOTHETICAL SEVEN

- 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?**

HYPOTHETICAL SEVEN

- **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

HYPOTHETICAL EIGHT

- The same requester from Hypothetical #7 submitted a similar request to a school district for the Internet Browsing History for 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?**

HYPOTHETICAL EIGHT

- **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

HYPOTHETICAL NINE

- Someone requested copies of comments that had been deleted from the Facebook page of Borough council members.
- The Borough argued that it did not have to produce the comments because the Facebook page was a private official campaign forum and the Borough did not have standing to produce the requested records.
- **Did OOR order the Borough to produce the posts?**

HYPOTHETICAL NINE

- **YES.**
- OOR granted the Requester's appeal. OOR held that the Borough provided no legal basis for denying the request.
- Williams v. Ellwood City Borough, Docket No. AP 2019-0109



BEST PRACTICES

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?



TAKEAWAYS

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 email or social media “closet?”





ANY QUESTIONS?



THANK YOU

Maiello Brungo & Maiello

424 South 27th Street, #210 Pittsburgh, PA 15203
412.242.4400 | 412.242.4377
www.mbm-law.net

Michael L. Brungo | mlb@mbm-law.net
Falco A. Muscante | fam@mbm-law.net
Michael T. Kornis | mtk@mbm-law.net
Peter J. Halesey | pjh@mbm-law.net