



The Accidental Meeting: Right-to-Know Law & Sunshine Act

By Christopher L. Voltz, Esq.
Tucker Arensberg, P.C.

Elected borough council members are looked at as a community leaders and are expected to take a leadership role in representing the borough's interests. To meet these obligations, it is not unusual for council members to communicate via email, text messages, and other forms of electronic communications (which will all fall under the general term email below).

While email is fast and efficient, communicating this way could conflict with council's mandate to act in an open and transparent manner and to deliberate borough business at public meetings. In addition, the emails may be public records.

Accordingly, it is imperative that council understand how emails are governed by the Sunshine Actⁱ and the Right-to-Know Law (RTKL).ⁱⁱ

Sunshine Act

The Sunshine Act requires that borough business (i.e., official acts and deliberations) be conducted at meetings that are open to the public. Specifically, it "is the public policy of this Commonwealth to ensure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon."

To fulfill its purpose of making borough business open to the public, Section 704 of the Sunshine Act says that all official agency action and all deliberations by an agency must take place at a meeting open to the public.

Meetings

An email exchange is not open to the public and is not preceded

by public notice, so it violates the Sunshine Act if it is a "meeting." So, what's a meeting?

A meeting exists when a quorum of agency members is present for the purpose of deliberating or taking official action.

With respect to the first element, a quorum is a "majority of the membership of council then in office."ⁱⁱⁱ So if a borough has seven council members, then a quorum is four.

In addition, the term agency includes not only the council but also all committees created by borough council that are "authorized by the body to take official action or render advice on matters of agency [borough] business."

This means that any committees (e.g., zoning, recreation, public works, etc.) that are authorized to

continues on page 48...

make decisions or render advice to council are subject to the Sunshine Act and RTKL.

As to the second element of the meeting definition, official action includes establishing policies and voting on motions, proposals, resolutions, and ordinances.

Deliberating

Deliberation is defined as the “discussion of agency business held for the purpose of making a decision.”

The Pennsylvania Supreme Court has held that because the term deliberation “implies the exercise of judgment to determine which of multiple options is preferred . . . gatherings held solely for the purpose of collecting information or educating agency members about an issue” are not deliberations under the Sunshine Act.^{iv}

The court explained that deliberations occur when agency members weigh the pros and cons of the various options involved or otherwise engage in comparisons of the different choices available to them as an aid in reaching a decision on the topic.

Based on the above, while no PA appellate court has explicitly ruled on this issue, electronic communication between a quorum of council members deliberating (as defined above) about borough business almost certainly constitutes a meeting under the Sunshine Act.

The Office of Open Records (OOR) has taken the following position:

Voting members of an agency are not permitted to deliberate except at a public meeting. In other words, agency members exchanging opinions about an upcoming vote or encouraging other agency members to vote a particular way in an email discussion, or a discussion held via social media would violate the Sunshine Act.

While the OOR’s interpretation is not binding, it is consistent with decisions in other states and with prior Commonwealth court rulings.^v

Accordingly, a reviewing court would likely conclude that private deliberations via email by a quorum of council members are meetings under the Sunshine Act and, since it is virtually impossible to provide public notice of and allow public participation in such email exchanges, these meetings violate the Sunshine Act.

RTKL

In addition to violating the Sunshine Act, private deliberations via email by a quorum are also public records under RTKL.

The purpose of the RTKL is “to promote access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their

actions.” To achieve this purpose, RTKL says public records must be made available to the public for inspection and copying.

Section 102 defines a record broadly as all information that “documents a transaction or activity of an agency.” A public record is a record of a local agency that is not exempt under Section 708 of the RTKL, is not exempt under federal or state law, or is not privileged.

Emails among a quorum of council members deliberating borough business are records under RTKL. Therefore, such emails are public records, unless exempted by RTKL, by law, or by privilege.

While a privilege, such as the attorney-client privilege, could exempt certain emails and some of the 30 exemptions in Section 708 of RTKL could allow for redaction of portions of such emails, RTKL does not exempt such emails in their entirety.

To the contrary, RTKL says that such emails are public records. While Section 708(b)(10) exempts records reflecting “internal, pre-decisional deliberations” of an agency, it also explicitly says that unless another exception applies, records presented to a quorum for deliberation “are public records.”^{vi}

Courts have consistently held that deliberative emails among a quorum of council are public records under RTKL. For example, in

The purpose of the RTKL is “to promote access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.” To achieve this purpose, RTKL says public records must be made available to the public for inspection and copying.



About the author:
Christopher L. Voltz, Esq., is an associate at Tucker Arensberg, P.C.

He is a member of the Municipal and School Group, and assists municipal and school district clients with properly running a meeting and complying with the Sunshine Act; responding to requests for records made pursuant to the RTKL; prosecuting real estate tax assessment appeals and real estate tax exemption applications; and drafting ordinances, resolutions and policies. He can be reached at cvoltz@tuckerlaw.com. 

Mollick v. Township of Worcester,^{vii} the court acknowledged that Section 704 of the Sunshine Act mandated that official action and deliberations by a quorum take place at a public meeting and held that if emails on a private computer were exchanged for the purpose of deliberation of the township’s business by a quorum, then those records would be considered public records.

So, the content of the communications, not the device from which they are sent, determines whether the records are public.

With respect to deliberative emails exchanged by less than a quorum, the OOR has been inconsistent as to whether such emails are records under RTKL. Compare *Suminski v. Township of Derry*,^{viii} where it was said that responsive emails sent among less than a quorum were not records as defined by RTKL, and *Posti v. Mt. Lebanon School District*,^{ix} where responsive electronic communications sent among less than a quorum were records of the district.

Based on this, then to the extent such emails exist, the borough

would need to demonstrate that they are exempt under RTKL.^x

While this article could not address every intricacy of electronic communications under the Sunshine Act and RTKL, the important lesson is that emails exchanged among a quorum of council members, who are deliberating borough business, constitute an illegal meeting under the Sunshine Act and are most likely public records under RTKL.

For borough officials who have questions about a situation, they should discuss the matter with the borough solicitor because the consequences of violating these laws can be severe.

For example, under Section 714 of the Sunshine Act, any council member who participates in a meeting with the intent and purpose of violating the Sunshine Act (e.g., an email exchange to avoid deliberating an issue at a public meeting) commits a summary offense and is liable for fines ranging from \$100 to \$1,000 for the first offense and \$500 to \$2,000 for subsequent offenses.

ⁱ 65 Pa.C.S. § 701 *et seq.*

ⁱⁱ 65 P.S. § 67.101 *et seq.*

ⁱⁱⁱ 8 Pa.C.S. 1001(b).

^{iv} *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013).

^v See, e.g., *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Cmwlth. 2011).

^{vi} 65 P.S. § 67.708(b)(10)(ii).

^{vii} 32 A.3d 859 (Pa. Cmwlth. 2011).

^{viii} AP 2015-0060.

^{ix} AP 2018-0915.

^x 65 P.S. § 67.708(b)(10).