



PNA LEGAL UPDATE

LEGAL AND LEGISLATIVE ISSUES AFFECTING THE NEWS INDUSTRY

A supplement to Headlines & Deadlines

Legislative Update

Governor Tom Wolf presented his [2017-18 budget proposal](#) to a joint session of the General Assembly on Tuesday, Feb. 7. The legislature will return on Feb. 21 to begin Appropriations hearings.

This week, the House Local Government Committee voted favorably on [HR 50](#) (Harper, R-Montgomery), which directs the Legislative Budget and Finance Committee to conduct a comprehensive review of the fiscal impact of the Right to Know Law on Commonwealth and local agencies and make recommendations.

[HB 99](#) (Zimmerman, R-Lancaster), which would allow boroughs to bypass bidding and advertising requirements for emergency purchases, was also voted out of Committee. As proposed, the bill does not define emergency, leaving the determination of what is an emergency up to individual borough councils. The lack of a definition could lead to a wide range of borough actions - and spending - being taken with no advance notice.

The House Judiciary Committee voted favorably on [HB 27](#) (White, R-Philadelphia) this week. This bill is similar to HB1538 from last session, which was vetoed by Governor Wolf, and would prohibit the release of the identity of a law enforcement officer involved in a "use of force" that results in serious injury or death. Unless criminal charges are filed, identity information may only be released if the officer consents, 30 days have passed, or after a completed official investigation, and even then, disclosure is completely within the discretion of the police department involved, with no opportunity for challenge or review.

These bills now move to consideration on the House Floor.

[SB 8](#) (Folmer, R-Lebanon) received second consideration in the Senate this week and now awaits a vote in the Senate Appropriations Committee. This bill proposes significant changes to civil asset forfeiture in the Commonwealth. It would require district attorneys to provide annual audits of county forfeiture actions to the Attorney General, and the AG would be required to file a report with the House and Senate based on those audits.

Unfortunately, the bill makes the audits and reports confidential. PNA has argued that the bill would be stronger and clearer, and would further the public interest in understanding and tracking forfeiture dollars and items, if it expressly made the audits and reports subject to the Right to Know Law.

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Legal Hotline

Do you have a question for the Legal Hotline?

Contact 717-703-3080



LEGAL QUESTION?
CALL
717-703-3080

The Legal Hotline is not meant to be legal advice.

Legal Update PDF

Visit the PNA website for a [printable PDF](#) of this week's Legal Update.

Borough refuses to release details surrounding officer's resignation

Buffalo Valley Police Commission accepted the resignation of a police officer at the same time that they rescinded their decision to terminate him. The officer was fired two weeks ago, after he was allegedly involved in a domestic violence situation, and criminal charges were filed. Members of the commission refused to provide information about the terms of a separation agreement between the commission and the officer. Read more in [The Daily Item \(Sunbury\)](#) and read an [update here](#)

RTKL records reveal lawmakers' expenses

The Express-Times (Easton) obtained records showing legislators' reimbursements for food and lodging in 2016. Read more about the costs and lawmaker's responses [here](#).

Ex-employee may owe city refund

Records obtained under the RTKL show that Allentown's former Director of Community and Economic Development took 10 paid days off during his 11-week tenure. The city's leave policy apparently does not permit paid leave within the first 4 months of employment. Read more from [The Morning Call \(Allentown\)](#)

Beyond PA

FBI policy ends emailed FOIA requests

A new FBI policy will require FOIA requests to be submitted via fax or US Mail, ending the agency's years-long practice of accepting requests via email. The FBI will accept a small number of requests via an online web portal, but the portal limits the number of requests that can be submitted and imposes a number of other requirements on requesters. [Read more here](#)

From the Hotline

Q: A city council has asked council members to sign a confidentiality agreement forbidding council members from talking about executive session discussions and imposing a fine if they do. Is there anything in the Sunshine Act that prohibits talking about executive session matters?

A: No. The Sunshine Act does not prohibit elected officials from discussing executive session topics, and this kind of confidentiality agreement does not serve the public interest.

The Sunshine Act allows, but does not require, agencies to hold private sessions to deliberate certain limited topics, including issues related to specific employees, the purchase or lease of real estate, collective bargaining, litigation strategy, and matters that are confidential by law. The Sunshine Act does not limit elected officials' ability to discuss matters that were the subject of an executive session, and such a limitation does not serve the public interest. There are a limited number of other laws, such as FERPA, the Family Education Rights and Privacy Act, that prohibit agencies from disclosing specific topics, but a wide-ranging 'gag order' on elected officials is both unnecessary and inappropriate.

Elected officials are often in the best position to learn about and expose wrongdoing, malfeasance and waste, and when they do learn about such conduct, they have a duty to disclose it and seek remedial action. A confidentiality agreement that prohibits or punishes public officials' speech on matters of public concern discourages speech that serves the public interest.

Moreover, elected officials enjoy First Amendment rights, and government restrictions on the freedom of speech create potential constitutional issues. The US Supreme Court has not ruled on elected officials' constitutional speech rights since 1966, when it [found](#) elected officials enjoy a constitutional right to speak without fear of retaliation, but there have been subsequent cases in which government employees' speech rights have been [curtailed](#). In addressing the state of the law, the Third Circuit Court of Appeals recently ruled in a case involving First Amendment claims of an elected official who was denied reappointment to a paid position based on the content of his speech. In [Werkheiser v. Pocono Township](#), 780 F.3d 172 (3d. Cir. 2015), a township supervisor, who also served as the township roadmaster, was denied reappointment to the road master position after he expressed concern about township overpayment for administrative work. He sued his fellow township supervisors, and although the Court found the supervisors were entitled to qualified immunity, the Court was careful to highlight the unsettled nature of the law and the distinction between elected officials' constitutional speech rights and the purposes served under Supreme Court precedent and those of government employees. The

Court in *Werkheiser* noted that the Supreme Court has reasoned that elected officials be given the widest latitude to express their views of policy and debate on public issues should be uninhibited, robust, and wide-open. A confidentiality agreement limiting elected officials' speech does just the opposite.

As always, this is not intended to be, nor should it be construed as, legal advice. Please call the PNA Legal Hotline with questions at (717) 703-3080.

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