



PNA LEGAL UPDATE

LEGAL AND LEGISLATIVE ISSUES AFFECTING THE NEWS INDUSTRY

A supplement to Headlines & Deadlines

Friday, June 1, 2018

EDITORIALS

Butler Eagle

Wolf administration makes a mockery of PA RTKL law

The Legal Intelligencer (Philadelphia)

Why Bio-Tech and Pharma C-Suites Should Understand Sunshine Laws

LEGISLATIVE UPDATE

The Senate and House return to legislative session next week. Senator Scott Wagner (R-York) announced he will resign his State Senate seat effective Monday, June 4. Earlier this month, Wagner won the GOP primary to challenge Governor Tom Wolf for the state's top spot.

Sunshine Act Legislation

The House State Government Committee has scheduled a vote Tuesday on **HB 1531** (R-Christiana), requiring agencies to provide agendas in advance of meetings, so the public can attend and participate in issues that matter to them. PNA has advocated for and supports this legislation.

Senator Toomey co-sponsors PRINT Act

United States Senator Pat Toomey joined a group of bi-partisan lawmakers cosponsoring the PRINT ACT, which protects our industry from extremely damaging newsprint tariffs. Newspapers in the Commonwealth cannot absorb the additional financial burden this proposed tariff is sure to create. Read the [press release](#) and The Courier-Express (Dubois) [article](#). However, Senator Bob Casey currently opposes the legislation. PNA is sending a follow-up letter to Senator Casey urging his support.

Public School Executive Sessions

The House Education Committee is scheduled to vote on **House Bill 2327**, sponsored by Rep. Fee, on Monday. The bill amends the Public School Code exempting public school entity discussions of security and emergency preparedness from open meetings requirements. PNA is recommending an amendment.

County Code Legislation

The House Local Government Committee has scheduled a meeting next week on **SB 1005**, which updates and consolidates the County Code and the Second Class County Code. PNA has several concerns related to the change in public access to Coroners records and public notice provisions of the bill. The Committee Chairs will introduce an amendment to the bill, which PNA worked on with stakeholders, to address our concerns.

Public notices relating to local government audits

The Senate may be voting on three public notice bills next week relating to local government audits. PNA worked extensively on the language contained in Senate Bills **771**, **772** and **773**, sponsored by Senator Tom McGarrigle, and supports the bills. Representative Kate Harper has companion bills in the House.

Records regarding volunteer emergency service organizations

The Senate may be voting a four-bill package next week. Senate Bills **801**, **802**, **803** and **804**, sponsored by Senator Scott Hutchinson, permit municipal governments to purchase used equipment, vehicles, and other personal property from volunteer emergency service organizations without

competitive bidding. This results in less access to the underlying deal details. Under these bills, the public would have no way to access details regarding the property because volunteer organizations are not expressly subject to the Right to Know Law. PNA is recommending an amendment. Representative Kate Harper has companion bills in the House.

Public notices for municipal personal property

The Senate may be voting a three-bill package next week, [SB 947, 948 and 949](#), which increases the dollar threshold that triggers advertisement when selling municipal personal property from \$1,000 to \$2,000. PNA is fine with these bills.

Reporting unsafe school activities

[SB 1142](#), sponsored by Senator Pat Browne, may be voted next week, which establishes the Safe2Say Program providing for anonymous reporting concerning unsafe activities in schools. The confidentiality provisions of this bill go beyond general confidentiality and remove the information from the Right To Know Law generally. PNA is recommending an amendment.



LEGAL ISSUES FROM AROUND THE COMMONWEALTH

DA finds no intentional Sunshine Act violation, but disagrees with solicitor

Northumberland County District Attorney Tony Matulewicz is not prosecuting Shamokin City Council members after investigating claims that they violated the Pennsylvania open meetings law during the process to fill a vacant council position. While Matulewicz said there is no evidence that elected officials intended to violate the Sunshine Act - a requirement in proving a violation - the district attorney said the opinion of city Solicitor Frank Konopka clashes with the law, which specifically states that deliberation selection to fill a vacancy for any elected office must take place in public. Read more from [The Daily Item \(Sunbury\)](#).

Commonwealth Court issues decision affecting public access to bid records

A panel of the Commonwealth Court issued a precedential decision Thursday addressing the distinction between selection of bidders and award of the contract in relation to the bid exemption in the RTKL. Section 708(b)(26) of the law allows agencies to deny access to bid information until the contract has been awarded or all bids have been rejected. The Court found that "award of the contract" for purposes of Section 708(b)(26) means the execution of the contract, not the selection of offerors from amongst all bidders who submitted proposals. [Read the Court's opinion here.](#)

ACLU blocked from accessing state police social media policy

Saying public safety would be at risk, a state appeals court has barred the American Civil Liberties Union from obtaining the full state police policy for monitoring social media in criminal investigations. The Commonwealth Court panel's decision overturns a ruling by the state Office of Open Records, which ordered the police to turn over their complete, unredacted policy to the civil rights group. The judges on the panel did not review an unredacted copy of the policy before issuing their decision, instead relying solely on affidavits provided by the state police. The ACLU is expected to appeal the decision to the Pennsylvania Supreme Court. Read more from [PennLive/The Patriot-News \(Harrisburg\)](#) and read the court's memorandum (non-precedential) opinion [here.](#)

Proposed recording policy raises Sunshine Act concerns

Quakertown Borough has proposed a policy aimed at curbing "obstructive" recording at public meetings. Among other things, the policy would allow borough council members to prohibit public recording anytime a commenter objects to being recorded during a public meeting. This provision clearly conflicts with the Sunshine Act provision guaranteeing the public's right to record "all the proceedings." The policy will be voted on at the borough's June 6 meeting. [Read more here.](#)

911 recordings released in York County golf course racial discrimination

dispute

The York Daily Record has obtained 911 recordings made in a dispute where police were asked to remove five African American golfers from a York County golf course. The golfers, all women, were alleged to be breaking golf course rules and etiquette. The golfers disputed the allegations, arguing the 911 caller was racially motivated. [Read more here](#).

PNA note: the RTKL generally exempts 911 call recordings and transcripts from public access, but the law allows agencies or a court to release these records when release serves the public interest and outweighs any interest in confidentiality. Journalists seeking access to 911 call recordings or transcripts should explain the public interest served by release when making a request for this kind of record.

BEYOND PA

The Supreme Court is stubbornly analog – by design

When Supreme Court justices lack an understanding of what technology means for the lives of the people affected by their decisions, they will struggle to respond effectively to technological change. Any day now, that risk will be confronted anew. The court will issue a ruling in *Carpenter v. United States*, a case that revolves around the government's use of cell phone records, obtained without a warrant, to re-create the movements of a robbery suspect. [Read more here](#).

Mandatory health warnings for cigars do not violate First Amendment

A federal district court for the District of Columbia has held that the FDA's "Deeming Rule," which requires cigars to be treated as other tobacco products with respect to warnings on packaging and advertisements, does not violate the First Amendment and is enforceable. The Cigar Association of America brought suit challenging the constitutionality of the deeming rule as it applies to cigar warnings. An appeal is expected. [Read more here](#) and review the court's opinion [here](#).

OTHER RESOURCES

Neumann University offers RTKL retrospective and training

Neumann University will offer "A Retrospective and Look Forward 10 Years after the Adoption of the Right to Know Law (Act 3 of 2008)" on Wednesday, June 13 from 10 a.m.-1 p.m. Registration is free and open to all, with 3 CLE credits available for attorneys. Presenters and panelists include former Governor Ed Rendell, Judge (formerly Senator) Dominic Pileggi, Erik Erneson, Exec. Director of the Office of Open Records, John Baer, Philadelphia Daily News, as well as other distinguished presenters and panelists. [Learn more and register here](#).

FROM THE HOTLINE

Email Deliberation

Q: A local borough is facing a large and unexpected invoice. Borough council president emailed co-council members about the resulting budget shortfall and asked for proposed spending cuts and opinions on each proposal. Does this constitute "deliberation" outside of a public meeting, and can elected officials use email to deliberate outside a public meeting?

A: There is no exception to the Sunshine Act that allows deliberations by a quorum to take place via email, and such an email discussion raises Sunshine Act compliance issues.

The Sunshine Act requires that anytime a quorum of an agency deliberates agency business, they must do so at a public meeting unless an exception applies. There are a number of limited exceptions to the law that allow private deliberations on issues such as personnel, pending or threatened litigation, collective bargaining and the acquisition of real estate, but there is no exception that allows a quorum to deliberate privately via email or other non-public means of communication.

The law defines "deliberation" broadly as "the discussion of agency business held for the purpose of making a decision." The general rule requiring deliberation at a public meeting is likewise broad and intended to allow the public to witness and participate in decisions about agency business.

When a quorum of borough council members discusses proposals to fill a gap in funding, it is a

discussion that must occur at a public meeting so that the public can understand the reason for the proposed action and comment before council takes action. Email is an essential tool in the function of local government, but elected officials must recognize the public interest enshrined in the Sunshine Act and refrain from using technology to thwart the letter and intent of the law. Public access is critical at all stages of policy formation, including its origin.

Journalists should also note that public officials' emails are presumptively public records under the Right to Know Law. Emails that show deliberation by a quorum outside of a public meeting would illustrate an agency's Sunshine Act compliance shortcomings and show where improvement is needed.

As always, this is not intended to be, nor should it be construed as, legal advice. Please consult your newspaper's attorney or the Legal Hotline at (717) 730-3080 with questions.

MORE NEWS AND TRAINING

- [Registration for PNA's 26th annual Media Lawyers Conference now open](#)



[Download a pdf of this edition](#)

Holly Lubart, Director, Government Affairs | hollyl@pa-news.org | (717) 703-3032
Melissa Melewsky, Media Law Counsel | melissam@pa-news.org | (717) 703-3048



<http://panewsmedia.org> | (717) 703-3000