



The Right-to-Know Law and Sunshine Act

*Balancing Transparency and
Confidentiality in Local Government*

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“The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them.”

– Patrick Henry

The rights of Pennsylvanians to access public records and to witness their elected officials engaged in the decision-making process lie at the heart of fair and democratic governance.

To achieve the former goal, the General Assembly enacted the Right-to-Know Law (RTKL), which presumes that all local government records are subject to public disclosure, with some important exceptions. To achieve the latter goal, the General Assembly enacted the Sunshine Law, which defines how local governments deliberate and take official action.

Given the magnitude of these rights, recently elected and veteran borough officials should have a firm understanding of how these laws apply to them and their municipality. The boundary between disclosure and secrecy is not as simple as Patrick Henry proposed.

The statutory exceptions to open decision making and the disclosure of records underscore a necessary balance between transparency and confidentiality in local government.

Incoming elected officials soon learn that confidentiality of certain governmental functions is necessary to protect public safety, privileged communications, and the privacy rights of municipal employees. The line between these competing interests is not always clear and has been the subject of contentious litigation.

While not all aspects of the statutes are addressed here, this article focuses on key features of the law that newly elected/appointed and veteran borough officials should consider.

Knowledge and Restraint

All local elected officials should familiarize themselves with both statutes to lawfully and responsibly execute their duties.

Compliance should not be blindly delegated to the borough secretary, solicitor, or manager – especially in the context of the Sunshine Act, which imposes penalties on “any member of an agency who participates in a meeting with the intent and purpose of violating” the act.



Saxtonburg Borough, Butler County

“An agency [such as the borough] shall not make payment on behalf of or reimburse a member of an agency for a fine or cost resulting from the member’s violation of” the Sunshine Act. Moreover, violations that are committed “willfully or with wanton disregard” can result in attorneys’ fees being imposed against an elected official.

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ADVERTISING REQUIREMENTS FACT SHEET

Sunshine Law Advertisements

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| Regular and Committee meetings | Publish once three days in advance of the first meeting of the year. |
| Special or Rescheduled Meetings [Section 1006 (1) of Borough Code] | Advertise once, no less than 24 hours in advance of meeting, and the reason for holding the special meeting must be stated in the ad. |
| Recessed or Reconvened Meetings | Posting only, no publication required and notice to those requesting. |
| Emergency Meetings | No notice for emergency meetings. Must present a clear and present danger. |
| Work Sessions | Technically not authorized by Sunshine Act, Borough Code or any other law. Check with borough solicitor. In 1989 Lackawanna Court of Common Pleas ruled they are illegal meetings. |

Borough Code Provisions

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| Bids, Purchases and Contracts over \$19,400 [Section 1402 (a)], please note this may change in January 2016 due to any changes in the Consumer Price Index in December. | Twice: 1) Not more than 45 days prior to the date set for the opening of bids; 2) Not fewer than 10 days prior to the date set for the opening of bids in a newspaper of general circulation or in a weekly paper once a week for two successive weeks. |
| Selling borough real property or personal property [Section 1201.1 (a)] or Auction | One time not fewer than 10 days prior to the date fixed for the opening of bids or public auction. |
| Annual Budget [Section 1307] and [Section 1308 (a)] | It must be available for 10 days public inspection prior to adoption. Budgets under \$50,000 exempt. |
| Civil Service Exams [Section 1181 (4)(b)] | Once at least two weeks prior to the exam. |
| Auditors' Financial Statements [Section 1059.1(a)] | One time within 10 days of completion of the audit and detailed report; no summaries allowed. |
| Fire Prevention Code [Section 1202 (15)] | Once in a newspaper of general circulation at least one week and no more than three weeks prior to presentation to council. |
| Incorporation of Boroughs [Section 202 (2) (e)] | In a newspaper of general circulation and legal journal not fewer than 30 days following filing, once a week for four consecutive weeks. |
| Ordinances, amended or repealed [Section 3301.2 (a)] | One time in a newspaper of general circulation not fewer than seven days or more than 60 days prior to passage. |
| Ordinances (codification) [Section 3301.5] | Enacted as a single ordinance, advertise at least 15 days before enactment. |
| Ordinance, Sewage Treatment Works Construction Outside Borough [Section 2010] | Once a week for four weeks in a newspaper of general circulation (a newspaper published daily and available for a subscription fee). |
| Ordinance, Transcripts in new ordinance book [Section 3301.7(a)] | Once in a newspaper of general circulation. |
| Public Auction [Section 1201.1 (a.1)] | Not fewer than 10 days prior to auction. |
| Shade Tree Commission-planting, removal, or transplanting of trees [Section 2720.3; 2724.1 (b)] | Once a week for two weeks in a newspaper of general circulation prior to the meeting. The notice shall specify the streets or portion thereof affected. |
| Street Opening [Section 1731(b)-(c)] | At least 15 days notice in a newspaper of general circulation and after 15 days' personal notice to the property owners affected. |
| Street Vacation [Section 1731(b)-(c)] | Advertise once no fewer than 7 days prior to passage; no such ordinance shall be effective for 40 days. If street is on recorded plan, 30 days notice in a newspaper of general circulation of the proposed vacancy. Posting of notice on affected property. Hearings on petitions against vacation – at least 15 days notice prior to hearing. |

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For the RTKL, the burden of compliance rests with the designated open records officer. How officials communicate with each other, borough employees, etc., will have a direct impact on complying with RTKL.

Municipalities are often presented with broad requests for extensive email communications among borough officials who may “vent” in a way that could expose them and the borough to unnecessary litigation.

Whether such communications must be disclosed will depend on whether they: are records of the public agency; exempt as internal, pre-decisional deliberations; privileged attorney-client communications; relate to personnel or labor matters; or relate to criminal or non-criminal investigations.

Notably, these communications could constitute unlawful “decisions” made outside of public meetings in violation of the Sunshine Law.

Accordingly, yearly training of borough officials by qualified legal professionals, together with a planned strategic approach on how officials should communicate with each other, employees, and third parties is recommended.



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Police Operations & Personnel Management

Achieving the proper balance between transparency and confidentiality can pose quite a challenge in an age when allegations of police misconduct dominate the headlines. The media’s voracious appetite for such news, coupled with the public’s

demand for police accountability are not usually aligned with the constitutional and privacy rights of the accused officer and the complainant.

The following scenarios illustrate a myriad of issues that can arise.

- **Police operations:** A police officer responds to a domestic disturbance and enters a home with his body camera on. A physical altercation ensues, and

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the officer uses force to subdue the suspect, which results in serious injury to the suspect. Following the incident, a resident files an RTKL request for the video footage. The public may consider the disclosure necessary to ensure police accountability. However, disclosure of the video could: go viral on the web; compromise the criminal investigation; violate the RTKL personnel exception; identify innocent juveniles; and embarrass victims who may want to remain anonymous.

- **Police personnel:** The police officer in the first scenario is placed on paid administrative leave pending an internal investigation. During a borough council meeting, residents demand details about the incident. However, such disclosure could reveal privileged communications with the borough's attorneys and improperly place the officer in a false light before all the facts are known and the officer presents his side of the story.

Trends in the Law

The underpinnings of the RTKL and Sunshine Act are constantly in flux.

- **Police body cams and the new exception to RTKL:** Act 22 of 2017 has fundamentally changed RTKL requests for police body-camera footage.

Effective Sept. 5, the law permits the use of body cameras inside private residences, which would no longer violate PA's Wiretap Act. Requests for this footage must be made within 60 days of the date of the recording and must be assessed by the police agency as to whether the recording contains evidence in a criminal matter, information pertaining to an investigation, or other confidential or victim information. Unlike the typical five-day response period, Act 22 provides for a response within 30 days. If a request is denied, then the requester must file a petition within 30 days of the denial with the county court of common pleas.

- **Police officers' home addresses:** With the recent headlines of protestors demonstrating at the home of a Philadelphia police officer involved in a shooting, HB 27 is before the House. It would prohibit the release of the name and identifying information of a police officer involved in the discharge of a firearm within 30 days of the event.
- **Executive sessions:** House Bill 37 would impose substantial restrictions on the ability of borough councils to hold executive sessions and require that they be audio recorded. The bill would clarify that "informational meetings or briefings"

are considered "deliberations," and, thus, subject to the open meeting requirements. The bill would allow for discussions on security and emergency preparedness as a component of an executive session. The bill would also require council to consult with the solicitor on whether to hold the executive session prior to doing so; if not, "the elected official in charge" would be required to make an affirmative decision on the parameters for the executive session. In either event, the borough would be obligated to make a public announcement of the source of the opinion on the validity of the executive session.

In view of the critical impact RTKL and the Sunshine Act have on open and responsible local governance, all local elected officials and managers should be trained by qualified legal professionals to ensure compliance, reduce the risk of costly lawsuits, and to maximize the level of governmental services to the public.

About the authors: Christopher Gerber, Esq., and Michael Crotty, Esq., are partners in the law firm of Siana Bellwoar, which represents clients throughout PA and New Jersey in the areas of business law, municipal law, civil litigation, employment law, education law, as well as real estate and land use matters. To learn more, visit www.sianalaw.com. 