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# *Maintaining Electronic Records in Your Borough*

*Technology has changed records management*

The use of portable electronic devices like laptops, tablets, and smartphones makes it possible for public officials and employees to conduct public business from almost anywhere. A borough council member may send an email from a computer in the borough office, and later read responses to that email on his or her personal smartphone. No law prohibits public officials from using personal devices or personal email accounts to conduct public business. However, if public business is conducted on personal devices, Pennsylvania law requires the borough to maintain those communications.

The Municipal Records Act<sup>i</sup> governs the retention and disposition of records by most local agencies, including boroughs. This act requires boroughs to adopt the retention and disposition schedule promulgated by the PA Histor-

ical and Museum Commission (PHMC) and approved by the Local Government Records Committee. It prohibits the disposition of public records except in conformity with that schedule.

Many boroughs receive requests under the Right-to-Know Law (RTKL) for electronic communications of borough officials and employees. The RTKL requires boroughs to retrieve electronic communications discussing agency business, even if the electronic communications are stored on personal devices or personal email accounts, and to disclose those communications to the public unless an exemption applies.

The RTKL empowers private citizens to seek sanctions, including court costs, attorney fees, and civil penalties, if an agency denies access to a public record in bad faith. Courts also have the

authority to impose civil penalties of up to \$500 per day against an agency or individual public official who does not promptly comply with a court order to disclose public records. Agencies and public officials have immunity from the penalty provisions of the RTKL if they delete emails in compliance with the records retention and disposition schedule.

The following tips will help borough officials and employees ensure that their municipality is maintaining electronic records as required by law.

## **Adopt the Records Retention and Disposition Schedule**

The records retention and disposition schedule is published in the Municipal Records Manual. To access it online, visit [www.phmc.state.pa.us](http://www.phmc.state.pa.us) and type

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<sup>i</sup> 53 P.S. §§ 1381 – 1389





“Municipal Records Manual” into the search bar. The Municipal Records Manual is more than 100 pages and contains specific disposition schedules for many types of records. The manual contains a model resolution for adopting the schedule.

The Commission has also established a policy and guidelines for the management of electronic records including email systems. The policy offers guidance on procedures to retain and dispose of electronic records, security of electronic records, and selection and maintenance of electronic records storage media. Electronic records are to be retained and disposed of pursuant to the same schedule used for non-electronic records.



### Email Management

Boroughs should establish an agency file plan, detailing where records are to be maintained in accordance with the records retention and disposition schedule. Emails and other

electronic communications such as text messages and social media postings should be filed with other records with the same subject matter in established electronic folders. The key to email management is managing content upfront with consistent filing and naming conventions. It is recommended that electronic communications be stored electronically, but if a borough uses paper filing systems, steps should be made to ensure electronic communications are printed out and stored in appropriate files.

The agency file plan should dictate whether each public official and employee is responsible for filing his or her own electronic communications in appropriate locations, or whether filing should be assigned to a designated employee. If filing is assigned to a designated employee, he or she should be provided access to agency email accounts, or, where personal email accounts are used, emails should be forwarded to the designated employee.



### Use Agency Provided Email Accounts

If possible, borough officials and employees should use agency provided email accounts instead of personal email accounts. The media has been “outing” public officials who use personal email accounts to conduct official business. These reports may damage reputations even where officials have done nothing wrong. If resources do not permit it, officials who use personal email accounts to conduct public business remain obligated to maintain records in accordance with the records retention and disposition schedule. If electronic records are properly maintained in appropriate locations, the borough’s staff will be able to efficiently respond to RTKL requests, and there will be no need for the open records officer to ask public officials to search their personal devices or personal email accounts.



### Only Retain What You Must

Borough officials and employees only need to retain emails that are “records” of the borough. This means information that documents a transaction or activity of the borough and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the borough. Emails that are personal or not related to the official business of the borough are not “records” and need not be retained.

Many emails that qualify as “records” of the borough are transitory, meaning they have no long-term value. Examples of transitory emails include:

- Emails scheduling meetings
- Preliminary drafts of letters, memoranda, or reports, and other information materials that do not record decisions
- Duplicate messages
- Vendor product information packets and brochures

Transitory emails may be deleted after they lose administrative value. The Pennsylvania Commonwealth Court recently confirmed that individual public officials and employees may “cleanse” their email accounts by deleting transitory emails on a daily basis.



### Observe the Sunshine Act

The Open Meeting Law (“Sunshine Act”)<sup>ii</sup> generally requires borough council members to perform “deliberations” that lead to official actions at public meetings. The Sunshine Act defines “deliberations” as “the discussion of agency business for the purpose of making a decision.” A public official who deliberates agency business in private for the purpose of violating the Sunshine Act commits a summary offense. Courts have the power to invalidate any action made by an agency in violation of the Sunshine Act.

Borough officials can avoid *inadvertent violations* the Sunshine Act by keeping emails factual. Not all communications by public officials constitute “deliberations” under the Sunshine Act. The Pennsylvania Supreme Court recently explained, “[g]atherings held solely for the purpose of collecting information or educating agency members about an issue [are not “deliberations” under the



Sunshine Act], notwithstanding that the information may later assist the members in taking official action on the issue.”<sup>iii</sup>

On the other hand, “deliberations” occur “where 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.” Caution must be exercised during any gathering of a quorum of municipal body members.

The use of portable electronic devices has challenged boroughs’ ability to remain compliant with both the Municipal Records Act and the RTKL. Boroughs should implement or update their agency file plans to ensure that electronic communications are maintained in accordance with both the records retention and disposition schedules. Borough officials and employees should

also strive to make sure that electronic records are retained in the appropriate locations for the periods of time required by law.

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<sup>ii</sup> 65 Pa.C.S.A. §§ 701 – 716

<sup>iii</sup> Smith v. Twp. of Richmond, 623 Pa. 209, 222, 82 A.3d 407, 415 (2013).