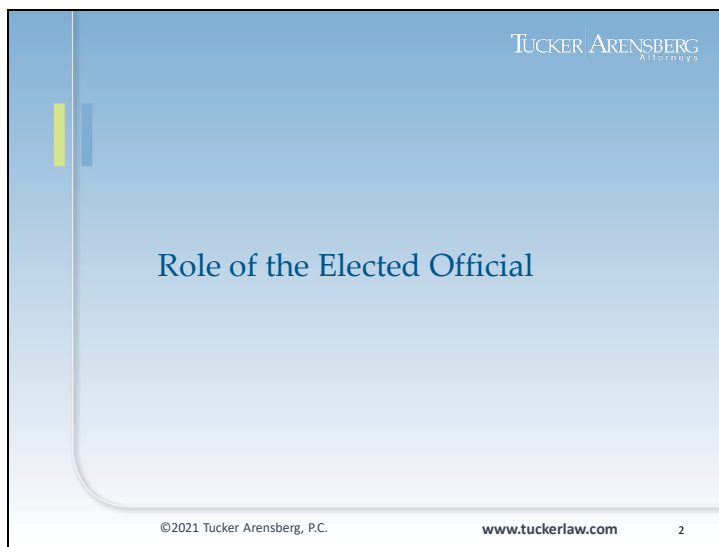



Slide 2





The Role of the Elected Official

Legislative: Elected Officials serve as the legislative body of the municipality, setting policy, enacting ordinances and resolutions, adopting budgets and levying taxes.

Executive: Even when there is a Mayor, the other elected officials perform executive functions such as formulating the budget, enforcing ordinances, approving expenditures and hiring employees.

Quasi-Judicial: state law gives elected officials quasi-judicial powers as a hearing board to hear, interpret local ordinances and decide certain issues. These include hearings on such matters as local personnel actions and various types of applications under the Pennsylvania Municipalities Planning Code.

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Role of the Elected Official

Community Leader: Because of your elected status, you are often looked to as a community leader:

- proper recipients of complaints, ideas and suggestions concerning township affairs.
- called upon to perform as a problem solver, acting as an agent for township citizens with outside agencies or private firms.
- representing your municipality's communal interests, past, present and future.

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Communication

"The art of communication is the language of leadership."
— James Humes

"Think like a wise man but communicate in the language
of the people." — **William Butler Yeats**

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Communication

Previously, communication with constituents was limited to:

- Monthly meetings (public comment)
- Personal interaction (phone, in-person, email)
- Mass emails

Now, Social Media offers a platform to reach many constituents at once.

- The Supreme Court of the United States has opined that social media may now be “the most important” modern forum “for the exchange of views.” Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (comparing social media to traditional public fora such as parks and streets).

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Social Media

What is it?

Social media is a collective term for websites and applications which focus on communication, community-based input, interaction, content-sharing and collaboration.

Social media has become larger and more accessible thanks to access to mobile applications.

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Governmental Use of Social Media

Connecting with Constituents (Dinner Party): Invites audiences in and creates a dialogue with them. They encourage discussion and engagement between the host (Municipality) and the guests (constituents).

- Benefits include community input and involvement
- Any downside?

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Rude Guests that will not Leave

Once the government chooses a platform that permits public comment:

- it has created a type of forum for nongovernmental parties' speech, and
- it is now bound by traditional First Amendment principles when regulating the speech of the commenters.

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Second Circuit

- Knight First Amendment Institute v. Trump. In 2019, the Second Circuit ruled that President Trump violated the First Amendment by removing from the “interactive space” of his Twitter account several individuals who were very critical of him and his governmental policies. Trump “consistently used the Account as an important tool of governance and executive outreach.

By blocking the individual Plaintiffs and preventing them from viewing, retweeting, replying to, and liking his tweets, the President excluded the Individual Plaintiffs from a public forum, something the First Amendment prohibits.

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The slide features a blue header with the firm's name 'TUCKER ARENSBERG Attorneys' in white. Below the header is a white content area with a blue and yellow vertical bar on the left. The title 'Fourth Circuit' is in blue. The main text is in black, consisting of two bullet points and a concluding sentence. At the bottom, there is a footer with copyright information, the website 'www.tuckerlaw.com', and the slide number '14'.

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Fourth Circuit

- Davison v. Randall. In 2019, the Fourth Circuit found that a local public official created a public forum with her Facebook page and violated the First Amendment when she removed one of her constituents when he began posting about alleged municipal corruption in the public comments section of her page.
- The Fourth Circuit determined that “Randall’s ban of Davison amounted to viewpoint discrimination” violative of the First Amendment. “

Put simply, Randall unconstitutionally sought to suppress Davison’s opinion that there was corruption on the School Board

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Not every social media account operated by a public official is a government account

- Campbell v. Reisch. The Eighth Circuit found that a state legislator's social media activity did not constitute state action because the account was used "overwhelmingly for campaign purposes."
- Individuals running for office are private.
- The court distinguished Trump and Randall because official governmental activity was conducted in those accounts

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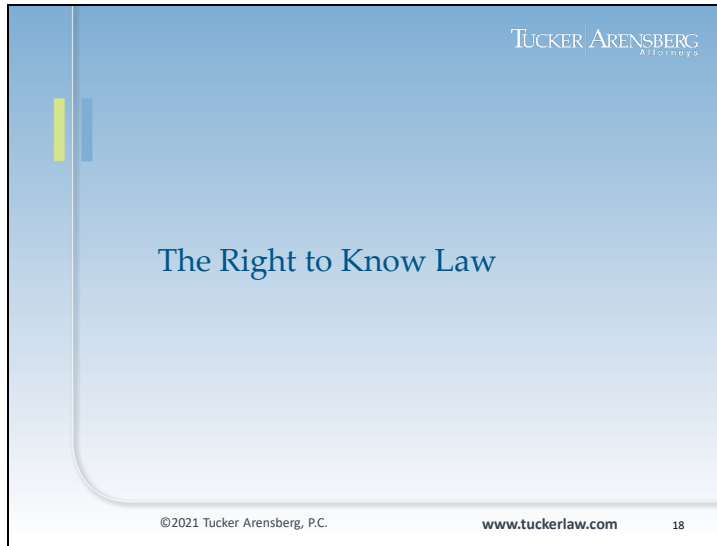
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Not All Comments are Protected Speech

- Cannot regulate based on content, even if it offends.
- Courts have recognized that social media websites may be monitored because moderation is necessary to preserve social media websites as useful forums for the exchange of ideas.
- Courts have indicated that neutral, comprehensive social media policies are acceptable.
- Not required to allow comments.

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Slide 18



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The Right to Know Law

- The objective of the Right to Know Law is to “empower citizens by affording them access to information concerning the activities of their government.”
- Further, this law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.”


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Right to Know Law

- Local agencies subject to the RTKL are required to disclose public records. 65 P.S. § 67.302.
- Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305.
- An agency bears the burden of proving the applicability of any cited exemptions. 65 P.S. § 67.708(b).

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Right to Know Law

- Record: “Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency...”
- Public Record: “A record ... of a . . . local agency” unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree.

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Documents a Transaction of Activity

Personal Messages:

- Private, personal emails sent on an agency computer via an agency email account **are not records** because they do not document business or activity of an agency
- Examples:
 - text messages or emails to a spouse about dinner.
 - Easton Area School District v. Baxter, 35 A.3d 1259 (Pa.Cmwlth. 2012)

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Documents a Transaction or Activity

Personal Devices

- emails were sent on personal computers using personal email addresses and on personal time, nonetheless, the emails sent between township supervisors were “records” under the RTKL because those records documented a transaction or activity of the township.
- Mollick v. Township of Worcester, 32 A.3d 859 (Pa.mmw.2011)
- Pennsylvania Off. of Atty. Gen. v. Philadelphia Inquirer, 127 A.3d 57, 58–59 (Pa. Cmmw. 2015)

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Documents a Transaction or Activity

Extreme Case:

Pennsylvania Off. of Atty. Gen. v. Philadelphia Inquirer, 127 A.3d 57, 58–59 (Pa. Cmmw. 2015)

- Pornographic emails exchanged between employees (former) of the Office of Attorney General on government accounts during working hours in violation of government policy do not document a transaction or activity of the government.

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Documents a Transaction or Activity

Rule for Emails:

What makes an email a “public record,” is:

- whether the information sought documents an agency transaction or activity;
- the fact whether the information is sent to, stored on or received by a public or personal computer is irrelevant.

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Social Media and the RTKL

Unofficial, Personal Facebook Pages Discussing Borough Business are Records of the Borough

- [Purdy v. Chambersburg Borough](#), AP 2018-1229
- [Boyer v. Wyoming Borough](#), AP 2018-1110
- [Schultz v. Montgomery County](#), AP 2020-1280
- [Ford v. Mt. Pocono Borough](#), AP 2020-0897,

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Personal Social Media Accounts are Not Records if Officials are Commenting in Personal Capacities

- Chirico v. Cheltenham Township School District, AP 2018-0391
- Background: school board president read a statement regarding another school board member's Facebook post to hold a "Cover Our Schools in Prayer" event on school Property.
- Request: information about the other school board members' Facebook accounts, including their viewing history and messages regarding the Prayer post
- Holding: Not records of the District
- Reason: each school board member attested that they only maintain personal Facebook pages and, when they post or comment on their pages, they do not hold themselves out as commenting as school board members.
- In addition, one board member acknowledged that he had been contacted by members of the public on matters concerning the District, but he asserted that the contents of the communications were not shared with other school board members and that the communications were not relied upon when making a decision.

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General rule

- All deliberations and/or official action by a public agency must take place at a meeting that is open to the public.
- The public must be given advance notice of the meeting.
- The public has an opportunity to attend, participate, and comment before an agency takes that official action

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What is a “Meeting”?

Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

- A quorum is when a majority of the agency's members are in attendance.

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What is “Official Action”?

- Recommendations made by an agency pursuant to statute, ordinance or executive order.
- The establishment of policy by an agency.
- The decisions on agency business made by an agency.
 - “Agency business” includes the enactment of policies or laws, the creation of liability by contract or otherwise or the adjudication of rights.
- The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

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The Accidental Meeting

The Office of Open Records provides the following guidance:

Can agency members discuss agency business via email and/or social media?

An agency member is permitted to discuss agency business with members of the public, whether by email or social media (or in person, on the telephone, via postal mail, etc.). In many cases, such communications are public records available under the Right-to-Know Law.

However, 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.

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Aren't Internal Deliberations Exempt?

- Section 708(b)(10) of the RTKL exempts from disclosure records reflecting internal, predecisional deliberations.
- However, Section 708(b)(10)(ii) provides an exception to this exemption if it is presented to quorum for deliberation and is not otherwise exempt.
- [Longo v. Phoenix Area School District](#), AP 2020-0504

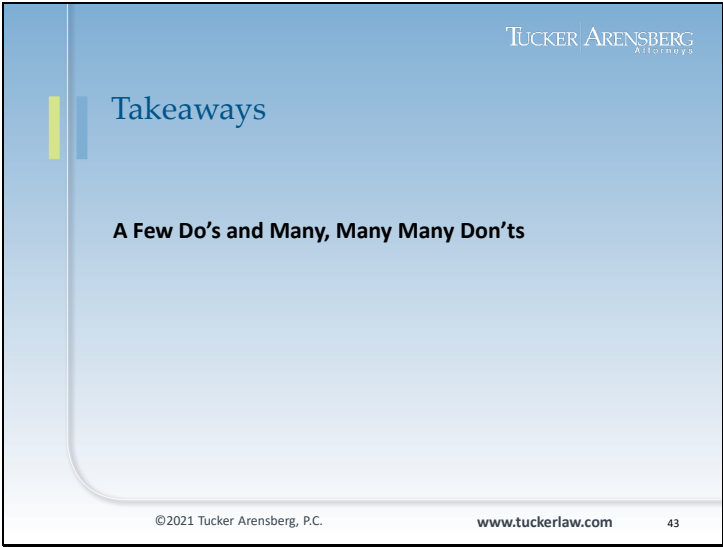
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Violations of the Sunshine Act

- Any member of an agency who is found to have willfully violated the act can face criminal charges and subject to fines of \$100 to \$1,000 for the first offense, and \$500 to \$2,000 for the second offense.
- Any fine must be paid personally (the agency cannot pay the fine).
- A court can also award attorney fees to the prevailing party if the court determines that an agency willfully or with wanton disregard violated the Sunshine Act.

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Takeaways

A Few Do's and Many, Many Many Don'ts

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Do: Understand The Sunshine Act

Borough business (*i.e.*, official acts and deliberations) generally must be conducted at meetings that are open to the public.

- 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.

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Don't: Promise Confidentiality

Ruland v. Southern York County School District, AP 2019-0567:

- The District's efforts to publicly address an incident at a staff meeting via email are an agency operation, and community responses to that document the agency's business.

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Do: Have a separate email account for Borough Business

- for emails to qualify as records of an agency, we look to the subject matter of the records, assessing whether they document a transaction or activity of the agency.
- if you commingle your work and business emails, you will have to review a larger set of documents when responding to a request.

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Thank you for attending!

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