

To Know or Not to Know: *That is the Ethical Question*



Right to Know Ethical Considerations

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Right to Know or Open Records Law

- Pennsylvania – called “Right to Know Law”
- Texas, Florida , New York, Illinois, Colorado, Minnesota, and California – called Open Records Act or Freedom of Information Act
- All states offer websites with the salaries of state officials
- Must submit a written request directly to the custodian of the record you are seeking – the agency where the record is kept
- Time deadlines for agency to respond vary – in PA (five business days with extension of 30 calendar)
- Other states – 10 to 30 calendar days to respond to requester



What is a “Record?”

- Pennsylvania - Record is defined as “information, regardless of physical form, that documents a transaction or activity of an agency that is created, received in connection with a transaction or business activity of the agency.” *PA Office of Attorney General v. Philadelphia Inquirer* (2016).
- New York – “any information kept, held, filed, produced ... by, with or for an agency or the state legislature, in any physical form...”
- Illinois – “public records” – transaction of public business in possession or control of any public body
- Look at your state’s Open Records or Freedom of Information Act – either defined by statute or case law interpretation



Legal Exemptions from Disclosure

- All states redact personal and financial information such as birthdates, social security and employee numbers, driver's license numbers, medical records, victims of certain crimes
- Critical Infrastructure plans – assets, places or things that could jeopardize the health, safety, welfare or security.
- Privileged information – such as attorney client communications and attorney work product; doctor/patient
- Pennsylvania has 30 codified exemptions including pre-decisional deliberations; non-criminal investigations; some personnel matters
- *Pa. State Education Assoc. v. Office of Open Records (Pa. Supreme Court, 2016)* – constitutional right to privacy in home address.



Emails

- *In Pennsylvania – PG Publishing v. Office of Administration (2014)*
- PA Commonwealth Court rules that transitory emails created in the normal course of business by a state employee can be deleted.
- Who administers your email system? Internal to your Commission OR administered by your state system? What happens when you delete an email? Where does it go?
- Is it Retrievable? Whose Possession and Control?
- PA Office of Administration – keep all deleted emails for 30 days – then permanently deleted. Why? No server farm can store the emails of 80,000 state employees forever.



Just Between Us: Attorney Client Privileges

- Attorney Client Communications and Attorney Client Work Product apply to “all information related to the representation.”
- **Only the Client can waive the communication privilege.**
- All states recognize these privileges.
- Attorney Work Product – mental impressions, legal theories, anticipation of litigation, materials prepared at the attorney’s direction, **waiver does not occur unless there is a likelihood the work product will be disclosed to opposing counsel or adversary.**
- *Rules of Professional Conduct 1.6*



Hypo for Your Consideration

- Open Records Requester asked government agency (PUC) for email exchanges between PUC's counsel and counsel for a utility – where PUC (as amicus party) and Utility defending the PUC's regulations in litigation filed by the Requester (Opposing Party).
- PUC denied – emails contained attorney work product – privileged.
- Requester appealed to state's office of open records (OOR).
- OOR said PUC waived privilege because:
 - PUC was government attorney (held to separate standard); PUC only an amicus party; no express written agreement was made; and PUC waived privilege to third party (Utility Counsel)



Privilege is Protected Because it is a Privilege Defined by Law

- PA's Right to Know Law and other states recognize Attorney Work Product as a privilege – exempt from disclosure
- PA Superior Court decision – *Paterno (2017)* – “attorney work product protected even if not prepared in anticipation of litigation.”
- *US Department of Justice Guide to the Freedom of Information Act* – “government attorney and private sector enjoy the same privilege” and Court does not require written agreement to be executed when the agency and private parties have a unity of interest in the litigation.” “Common interest attaches with a meeting of the minds.” Adopted by US Fourth Circuit Court of Appeals.



Ethical Consequences

- PUC is an amicus party to litigation; defending its regulatory authority
- Attorney Work Product was created in anticipation of litigation and shared only with Party (Utility Counsel) on the same side of the litigation
- Opposing Party (also the Requester) has current litigation against PUC in another legal forum
- Open Records ruling to disclose the PUC's attorney work product to the Requester would result in Opposing Party obtaining PUC's work product
- Who is responsible for waiving the PUC's work product to adversarial counsel?



You Can't Make This Stuff Up

- This is happening in Pennsylvania.
- The state's Office of Open Records acknowledged in its ruling that the emails being requested contained attorney work product.
- The Office of Open Records knows the Requester has active litigation against the PUC in another legal forum on the same subject matter that is the subject of litigation with Utility and PUC as amicus.
- Ethical Question of the Day: Should attorneys be allowed to use a state's open records law to obtain what they could never ethically obtain any other way? Obey PA Canons – Rule 1.6

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