2018 Hot Topics

Legal Trends Impacting Public Transit

The Right to Know Law is NOT Discovery

- For a record to be an "agency" record, it must be in the possession of the agency.
  - What if a record is in the possession of a consultant?
  - FOR DOCUMENTS TO BE PUBLIC THEY MUST RELATE TO THE GOVERNMENTAL FUNCTION OF THE AGENCY
- Do you have a Right to Know Officer designated?
- Time for Compliance- the 30 day extension is an important tool when faced with a request.

- You are NOT required to compile information or create documents. Compiling a report from a database is NOT the creation of a record. Pennsylvania State Police v. McGill, 83 A.3d 476 (Pa. Cmwlth. 2014)

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How are the Courts interpreting Exceptions?

- W-2's – these are specifically exempted based upon the provisions of the Pennsylvania Tax Code.
- Text messages If they have been deleted from the phone.
- Insurance adjuster's files- this is an important exception.
- Medical records
- Trade Secrets – if a request involves a trade secret or proprietary information you must notify the owner of the information.
- Personal Information – your employees must have notice that a request has been made regarding their information and MEANINGFUL opportunity to object. ----A.3d. ---, PaSEA v. Commonwealth, February 2015

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Personnel Files? Open Records?

- Turns out- Maybe not. . . . There is a "Personnel Files Act" that applies to files of existing employees
- In 2017, the Pennsylvania Supreme Court said that former employees are not privy to their personnel files – as such access provides an unfair litigation advantage
- If files are denied, the complaint must be filed with the Department of Labor and Industry
- For purposes of the Act, it appears that the Court will only considered you "employed" within about 30 days of termination

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http://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Pages/Personnel-File-Inspection.aspx

Personnel Records Act

- You may require a written request
- You must get an authorization from an employee if a third party is making a request on their behalf along with dates of file materials
- You need not copy files, but they may be viewed during regular business hours with no parts of the file removed
- The act limits what you may provide for review by an employee and generally includes information involving qualifications for promotion and the like and excludes other documents.
- Check the Act and website when confronted with a request
- Have a policy in place!

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Emails and Text Messages?

- In 2016, the Pennsylvania Courts have held that if a conversation by email is government related, it is still subject to the Right to Know law even if it is to a personal account.
- The Courts have looked closely at the attorney client privilege in the context of emails of whether emails are really legal advice and have voided the privilege when emails are forwarded.
- Texts have been treated the same as emails – now they are looking at the purpose of the text as opposed to who owns the phone.

- You must have an email retention plan and its should be published by resolution.

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Email Retention

- How do you file emails (per computer, per subject matter, etc.
- Do you have an internal policy with regard to passwords for company email accounts?
- Do you have a policy limiting personal use of emails?
- Your email policy should be clear about personal use of company computers, who owns the content of emails, whether you as a company monitors emails.
- Advise employees consistently that their email may be considered a public document depending on the content

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Sunshine Law

- How do you communicate with your board? Through email?
- How do you announce executive sessions?
- Do you monitor the content of executive sessions?
- Are all of your communications with your solicitor protected?
- Does your Bylaws allow audio participation?

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CAMERAS CAMERAS CAMERAS

Can I turn on the audio?

- In a neighboring jurisdiction the Courts finally rules that transit vehicles may turn on audio in their vehicles
- The key analysis was the wiretapping law, which is nearly identical to Pennsylvania's.
- The issue is whether there is a "reasonably expectation of privacy" and the Court found there is no such expectation regarding conversation on a transit vehicle
- Posting makes this even clearer
- Posting should be clear that there is not "around-the-clock" monitoring

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Are On-Board Videos Public Records?

- Towne v. Port Authority confirmed that bus videos are not public records if you properly respond to the request AND have the proper policy
- Your Policy is Critical – PPTA has model policies
- Your Policy must contain why you save videos
- Your Policy must contain limitations one when videos are saved
- Your Policy must contain a disclaimer that you cannot always guarantee that a camera is operating/recording
- Your Response should include an affidavit that confirms policy contents. PPTA has a model affidavit

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ADA Stops and Shelters

Access and Use

- US Access Board requires that not only are pedestrian facilities constructed properly, but that patrons can actually "use" the facilities:
  - Consider sidewalks
  - Access slope
  - Visibility of signage
  - Readability of signage
  - What about maintenance?

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Let's Talk Immunity

- Are bus stops an operational issue?
- Are bus stops an issue for the streets and sidewalks exception?
- Are you prepared to take this responsibility?

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US Access Requires Strict Design Standards for Stops and Shelters

- Stops and shelters are not limited to the structure itself
- Sign high, pedestrian pathways, design criteria and materials all factor into ADA access requirements
- You should use a design professional if you embark on a project of this nature due to the strict design requirements for the entire area of your shelter or sign areas
- If you cannot comply with the US Access requirements, you must demonstrate prior to any updates or changes why you cannot comply

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What Types of Improvements are Covered?

- Any type of project that uses any federal money for any design, construction or alteration of a pedestrian facility in the public right of way
- Transit stops and shelters at sidewalk areas and signage and route signs are all considered pedestrian facilities and must be “readily accessible”

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Meaningful Access To Service

- This means reasonable accommodation for riders
- 2017 Western District of PA stated you must not make fundamental or substantial changes, but reasonable ones to provide access to the service of your constituents
- A refusal to accommodate must include a demonstration that that would fundamentally alter, the service, program or activity
- How does this affect route design or deviation?

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Maintenance

- "Use" is not defined, what are your obligations to remove snow at your shelters/stops?
- What about sidewalks and pathways leading to shelters and stops?
- Do you own or lease the property?
- Do you have a contractor for this work? Are you properly indemnified?

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US Access and Maintenance

- Generally there are no specific maintenance requirements for daily use of pedestrian access ways
- HOWEVER, transit systems/federal recipients are required to ensure access to your shelter during construction projects that may impede access
- How do you achieve this requirement?

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INTERGOVERNMENTAL COOPERATION ACT

- Intergovernmental cooperation act requires that resolutions and agreements be adopted by municipal authorities when working cooperatively.
- The Resolution and Agreement must contain certain terms or they are not enforceable and/or could be challenged as improper
- What types of agreements fit into this Act?
  - Joint Procurement
  - Sharing of Staff
  - Trip sharing

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Enforceability

- Any resident may object to a joint initiative if the initiative is not properly adopted by the Board
- Agreements must contain the provisions of the Act in order to provide proper notice
- Presumably, to breach an agreement or terminate an agreement the same initiative must be undertaken

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Resolution Contents

- (1) The conditions of agreement in the case of cooperation with or delegation to other local governments, the Commonwealth, other states or the Federal Government.
- (2) The duration of the term of the agreement.
- (3) The purpose and objectives of the agreement, including the powers and scope of authority delegated in the agreement.
- (4) The manner and extent of financing the agreement.
- (5) The organizational structure necessary to implement the agreement.
- (6) The manner in which real or personal property shall be acquired, managed, licensed or disposed of.

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