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VIA ELECTRONIC MAIL (cerdman@pasen.gov)
Chuck Erdman, Executive Director
PA Senate Intergovernmental Operations Committee
Office of Senator Jarrett Coleman, 16th District

Re: **Senate Intergovernmental Committee Hearing, March 25, 2025**
Written Testimony of Joshua D. Bonn, Esq.,
Cohen Seglias Pallas Greenhall & Furman PC

Dear Mr. Erdman:

The committee scheduled this hearing to address use by public agencies, officials, and employees subject to the Right-to-Know Law (RTKL) and the Sunshine Act of messaging apps that automatically delete communications, sometimes within a day or less. Several RTKL requests and citizen lawsuits filed in Pennsylvania have brought awareness to the use by government officials of these messaging apps while conducting official business and communications.

Despite the emergence of new technologies, this is not a new issue. In 2014, the Commonwealth Court ruled that neither the RTKL nor the Administrative Code of 1929 prohibited state employees from deleting emails daily which the individual employees deemed to be "transitory" or "non-records."

The Municipal Records Manual, which governs record retention by most municipalities, contains similar provisions to Commonwealth retention policies that give public officials and employees significant discretion to not retain or delete electronic communications such as emails, text messages, social media posts, and instant messages. This discretion unquestionably results in deletion of public records. Use of such apps may also facilitate violations of the Sunshine Act by allowing bad actors to leave no paper trail of unlawful meetings.

Considering the above, legislation is needed to ensure government agencies properly retain public records. The use of instant messaging apps with instantaneous delete functions exacerbates the need for such legislation. I offer the following testimony in support of legislation to ensure proper retention of public records and to improve the Sunshine Act.

Biography

I am a partner at the law firm Cohen Seglias Pallas Greenhall & Furman PC. I practice transparency law and municipal law. My background is unique because I not only represent parties seeking to obtain public records, but I also represent local governments seeking to comply with open records and open meetings laws.

I have served as solicitor for various municipalities and a tax collection bureau. I advise on responding to public records requests, proper records retention, and compliance with the Sunshine Act.

I have extensive experience representing municipalities, businesses, private citizens, and media entities in public records litigation under Pennsylvania's Right-to-Know Law (RTKL). I have also prosecuted and defended numerous Sunshine Act cases. I have secured precedential rulings on privacy, trade secrets, and attorney-client and attorney work-product privileges. My representative cases include:

> *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143 (Pa. 2017) (compelling state Treasurer to disclose state employee list subject to redaction of personal information)
>
> *McKelvey v. Pennsylvania Dep't of Health*, 255 A.3d 385 (Pa. 2021) (compelling Department of Health to disclose applications to grow, process, and distribute medical marijuana).
>
> *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726 (Pa. 2022) (compelling school district to disclose school bus surveillance video subject to redaction of student identifiers)

I make presentations to various groups on the RTKL and the Sunshine Act, including the Pennsylvania State Association of Township Supervisors, the Pennsylvania Association of Boroughs, and several county bar associations.

Legislation is Needed to Ensure Government Agencies Properly Retain Public Records

In 2014, the Pittsburgh Post-Gazette filed a lawsuit against the Governor's Office of Administration and the Department of Education seeking to enjoin the permanent destruction of public records. *PG Pub. Co. v. Governor's Off. of Admin.*, 120 A.3d 456 (Pa. Commw. Ct. 2015), *aff'd*, 635 Pa. 263, 135 A.3d 578 (2016). The Commonwealth's record retention policy affords each state employee discretion to determine whether an email constitutes a "public record" that should be saved under the RTKL or if it may be deleted as a "transitory" or "non-record."[1] *Id.*,

[1] "Transitory records" are "[r]ecords that have little or no documentary or evidential value and that need not to [sic] be set aside for future use; have short term administrative, legal or

120 A.3d at 458-59. If an employee determines that an email is not a public record, it is permanently deleted from the server within 5 days with no possibility of recovery. *Id.*

The newspaper asserted that the Commonwealth's email retention policies vitiated the right to access public records because permanent deletion leaves the public with no recourse in the event the emails are later determined to be public records. *Id.* As evidence, the newspaper showed that the Department of Education produced only five emails in response to a request for an executive employee's emails over a one-year period. *Id.*

The Commonwealth Court dismissed the lawsuit. The court held that neither the RTKL nor the Administrative Code of 1929 prohibited state employees from deleting emails daily which the individual employees deemed to be "transitory" or "non-records." *Id.* at 463.

First, the RTKL does not require an agency to retain records for any period of time. *Id.* Once a record is deleted, properly or improperly, an agency has no obligation to produce a record that no longer exists. *Id.*

Second, the court found the "minor discretion" afforded to state employees in determining whether to keep or destroy emails was "proper and indeed necessary until the [government] employs executive officials or lawyers to review each and every e-mail an

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fiscal value and should be disposed of once that administrative, legal or fiscal use has expired; or are only useful for a short period of time, perhaps to ensure that a task is completed or to help prepare a final product...." GOA Manual 210.9.

"Non-Records" are "[i]nformation that does not meet the definition of a record. These materials relate to non-state government business or activities and may include items such as announcements of community events and personal e-mails. Non-records may also include publications such as trade journals, pamphlets, and reference materials received from outside organizations, conferences, and workshops. Non-records may be disposed of at the convenience of the agency when they have no more value or use to the agency. The following are examples of non-records:

- blank forms, publications, etc., which are outdated or superseded;
- preliminary drafts of letters, reports, and memoranda which do not represent significant basic steps in preparation of record documents;
- shorthand notes, stenography tapes, mechanical recordings which have since been transcribed, except where noted on the Agency–Specific Records Retention and Disposition Schedule;
- routing and other interdepartmental forms which do not add any significant material to the activity concerned; and
- form and guide letters, sample letters, form paragraphs, vendor product information packets and brochures."

Id.

employee proposes deleting pursuant to the retention schedule before it is deleted." *Id.* I disagree with this hyperbolic reasoning, as simply retaining emails for a reasonable period of time would remove human discretion and save public records from inadvertent or malicious destruction.

I experienced another example of an auto-deletion thwarting access to a public record. I represented a client in a mandamus action against the Philadelphia District Attorney's Office to enforce a final determination by the Office of Open Records, which ordered disclosure of an email between a prosecutor and a supervising grand jury judge. Discovery revealed that the email may have been automatically deleted during the litigation pursuant to the District Attorney's retention policy. The trial court ordered the District Attorney to search for the email, but it was already gone. Thus, my client was forever deprived access to the email, even though the OOR and the trial court held it was a public record.

The laws and regulations governing record retention, at both the state and local level, are incredibly complex. The state follows a patchwork of executive orders, management directives, and manuals. https://www.pa.gov/agencies/oa/programs/records-management.html. The Municipal Records Manual is 105 pages long.

I am not saying these policies are poorly drafted. The orders, directives, and manuals do a great job categorizing hundreds of types of records and the nuances of how and how long each type of record should be maintained. But with so many rules, it is unreasonable to expect that every public official and employee should know what needs to be retained or immediately deleted.

The Municipal Records Act, 53 Pa.C.S.A. §§ 1381 – 1389, governs the retention and disposition of records by most local agencies. Local agencies are required to adopt the retention and disposition schedule promulgated by the Pennsylvania Historical Commission and approved by the Local Government Records Committee. 53 Pa.C.S.A. § 1386.

Public records may only be disposed of if the disposition is in conformity with the retention and disposition schedule. 53 Pa.C.S.A. § 1383. Local agencies are required to approve each individual act of disposition of public records by resolution of the governing body. 53 Pa.C.S.A. § 1386.

The Municipal Records Manual, issued for the Local Government Records Committee by the Pennsylvania Historical and Museum Commission Bureau of the Pennsylvania State Archives, (available at https://www.pa.gov/agencies/phmc/pa-state-archives/state-records-management/local-government-retention-and-disposition-schedules.html), governs retention of most municipal records.

The Municipal Record Manual provides that correspondence of a transitory nature having no value after an action is completed must only be retained for as long as it has administrative value. See Section AL-1. As a litigator for the past twenty years, I can attest that a seemingly insignificant document can make or break a case. I once defended a municipality in the denial of a land development plan. Seemingly insignificant correspondence between the developer and the

zoning officer was crucial evidence to combat the developer's claims on appeal. If the zoning officer had deleted those emails as transitory, the municipality's denial may have been reversed.

One final point is that use of instant messaging apps with auto-deletion features violates the above discussed retention schedules because the public official or employee exercises no deference when communications are deleted automatically.

In sum, I recommend legislation that requires government agencies to retain public records for a defined period of time. Such legislation would prevent public officials from using instant messaging apps with auto-deletion features. It would also ensure that public records are not deleted as a result of a misunderstanding of complex retention schedules, or as a result of malicious deletion covered up as an innocent misunderstanding.

Decriminalize the Sunshine Act

The Sunshine Act requires government agencies in Pennsylvania to conduct official business at public meetings where a quorum of the agency's members are present. Any official action by an agency must be made by a publicly cast vote of the members of the governing body. There is no requirement to deliberate before taking official action, but any deliberations by a quorum preceding the vote must also occur in public.

Official action taken in violation of the Sunshine Act is void. A public official who intentionally violates the act may be found guilty of a summary offense.

The General Assembly has found that open meetings are vital to the functioning of the democratic process and that secrecy in public affairs undermines the public's faith in government.

The Sunshine Act insures the right of all citizens to have notice of and to attend agency meetings. A number of provisions of the Sunshine Act accomplish these goals. Agencies must publish notice of meetings unless there is an emergency involving danger to life or property. Citizens have the right to attend meetings, make public comments, and make audio or video recordings of meetings. There is a private cause of action available to citizens to challenge actions taken if they believe those actions occurred in violation of the Sunshine Act.

The current system designed to punish violations after the fact has not produced consistent administration of the open meeting requirements. Violations are notoriously difficult to prove.

Ordinarily, no one will know that agency officials deliberated agency business in secret unless one of the participants in the wrongful conduct publicly discloses what happened. This exposes the participant to summary conviction. Furthermore, district attorneys with limited resources to investigate have shown a reluctance to prosecute violations. Magisterial district judges, who would normally hear such cases, may not have familiarity with the nuances of the open meeting requirements.

In more cases than not, violations result from misunderstandings of the Sunshine Act rather than intentional acts. The most frequent causes of confusion under the Sunshine Act are the exceptions to the general rule of openness.

Governing bodies of agencies may meet in executive session to deliberate a number of topics, such as personnel matters, collective bargaining, real estate, pending litigation, and internal investigations. Although the law permits the governing body to discuss these matters outside public view, final deliberation and voting must be taken in public. The governing body must also publicly disclose the reason it is meeting in executive session including the specific matter to be deliberated.

Another area of confusion under the Sunshine Act occurs when agencies hold closed meetings to gather facts only and not to deliberate agency business. The Pennsylvania Supreme Court has held such pure fact gathering meetings do not violate the Act. This decision is consistent with precedent that allows agencies to convene *ad hoc* committees for the purpose of furnishing information and making non-binding recommendations to the governing body.[2] The Office of Open Records website states such committees are subject to Act even though caselaw is clear they are not. I have seen numerous municipal officials falsely accused of committing a "crime" for participating in such committees. These frivolous accusations deter individuals from continuing in public service.

The civil enforcement of the Sunshine Act is expensive for citizens and government agencies. Civil lawsuits costs tens of thousands of dollars. Although there is a fee shifting provision for willful violations and frivolous prosecutions, as discussed above, most violations result from confusion rather than willful misconduct. A streamlined administrative adjudication would benefit citizens and agencies.

Decriminalization of penalties would allow members of governing bodies to focus on compliance rather than avoiding summary convictions. The General Assembly also should give the Office of Open Records jurisdiction to review Sunshine Act complaints.

The Office of Open Records could provide education and resolve Sunshine Act questions in administrative proceedings, similar to its role to adjudicate open records disputes under the

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[2] *Ristau v. Casey*, 647 A.2d 642, 647 (Pa. Commw. 1994) (Governor's commission established to make nonbinding recommendations for candidates for vacant judicial positions was not subject to Sunshine Act because the Governor was not legally bound to accept recommendations and the Governor, rather than commission, exercised governmental authority to nominate the candidates); *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 500 A.2d 900, 905 (Pa. Commw.1985) (investigative commission established as a temporary, limited purpose, advisory board that did not have authority to make binding recommendations not subject to Sunshine Act); *Mazur v. Washington County Redevelopment Authority*, 900 A.2d 1024, 1029 (Pa. Commw. 2006) (tax increment financing (TIF) committee composed of representatives from local taxing authorities was not subject to Sunshine Act because the committee did not perform an essential government function, exercise governmental authority, or take official action).

Pennsylvania Right-to-Know Law. This would relieve District Attorneys and Magisterial District Judges of their role in policing and adjudicating Sunshine Act violations. The central role of the Office of Open Records would produce more consistent administration of open meeting and open records requirements on a statewide level.

CONCLUSION

Current law is inadequate to ensure proper retention of public records. Legislation that requires government agencies to retain electronic communications such as emails, text messages, social media posts, and instant messages for a defined period would eliminate human discretion that has resulted in improper destruction of public records. Additionally, decriminalizing the Sunshine Act would improve compliance and save law enforcement and judicial resources. Thank you for the opportunity to weigh in on these important policy matters.

Very truly yours,

Joshua D. Bonn

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