Pennsylvania Office of Open Records

Senate Intergovernmental Operations Committee

The Honorable Jarrett Coleman, Chair

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The Right-to-Know Law (RTKL) and Sunshine Act are two of the Commonwealth's strongest tools for transparency and accountability. They give citizens a glimpse into government operations, allowing them to see how decisions affecting their lives are made and providing a platform to voice their opinions.

While both laws are silent on the use of messaging apps that automatically delete communications, they still apply to such platforms. Moreover, they offer valuable insight into the potential consequences of using these apps—or similar communication tools—to circumvent transparency and accountability.

The Right-to-Know Law

To provide a general overview, text messages sent via apps like Signal undergo the same legal scrutiny as any other requested records. Similar to other appeals, those involving text messages and emails are typically resolved on a case-by-case basis, with careful consideration of the specific facts involved. In appeals related to text messages or emails, the general legal analysis follows this framework:

1. *Does the message exist? Has the message been deleted?*

The RTKL notably does not modify or supersede record and information retention policies and disposition schedules. The OOR determines whether access to existing records is required under the RTKL, not whether records should exist.[1] To the extent that a requester challenges an agency's retention policy, the validity of that policy is outside the OOR's jurisdiction. The RTKL states in § 507: Nothing in this act shall be construed to modify, rescind or supersede any record retention policy or disposition schedule of an agency established pursuant to law, regulation, policy or other directive.

However, in response to a RTKL request and appeal, agencies cannot merely allege that records do not exist; they must provide evidence stating that a reasonable search was conducted and outline what

[1] See Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

steps they took to locate any existing records. Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support.[2] In the absence of any evidence of bad faith, the averments in the affidavits should be accepted as true.[3] Agencies are also required to search for deleted records where there is sufficient reason to believe that the records still exist on an agency server.[4] If the agency fails to provide sufficient evidence that the record does not exist or that a reasonable search was conducted, the OOR rules in favor of the requester. The agency is ordered to either produce the existing requested records or to conduct a reasonable search and provide the records or an affidavit confirming none exist. If it is later discovered that false statements were made to the OOR, criminal charges could result. The prosecution of such actions is outside the OOR's jurisdiction and lies with the appropriate law enforcement agency.

If a requester demonstrates that an agency employee or elected official inappropriately or illegally destroyed or deleted records that fall under the definition of an agency record prior to an OOR appeal, consequences for violations of record retention rules or policies fall outside of the RTKL. In such a situation, an OOR Final Determination can only deny or dismiss the appeal and find that the records do not exist. Barring any additional evidence of existence, the OOR will also be constrained to deny/dismiss any subsequent appeal regarding the same records. If a requester demonstrates that an agency employee or elected official inappropriately or illegally destroyed or deleted records that fall under the definition of an agency record during the course of an OOR appeal, the OOR will still be constrained to deny/dismiss the appeal, but may determine that the agency acted in bad faith and recommend the imposition of sanctions by a reviewing court.

2. *Is the requested record a record of the agency?*

If it is determined that a text message exists or a picture or copy of the text message exists, the OOR will then determine if the requested text message qualifies as a record of the agency or is a personal text message of the sender not subject to the RTKL. Section 102 of the RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a "transaction or activity of an agency?" and 2) if so, was the material "created, received or retained ... in connection with a transaction, business or activity of [an] agency?"[5] If a record is personal and has no official purpose, it does not qualify as an agency record. For example, a government official's text message to a spouse confirming a pet's veterinary appointment does not qualify as an agency record while one confirming a meeting with agency employees is.

3. *Is the requested record a public record?*

If the message is an agency record, the OOR will finally determine if the requested message is a public record or if the agency is permitted to withhold it. The RTKL contains a number of exemptions that allow but do not require an agency to withhold agency records. Some exemptions that might allow an agency to withhold text messages could include those that reflect internal predecisional deliberations,

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[2] See Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).
[3] See McGowan v. Pa. Dep't of Envtl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).
[4] See Pa. Dep't of Labor & Indus. v. Earley, 126 A.3d 355, 358 (Pa. Commw. Ct. 2015).
[5] See 65 P.S. § 67.102; Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc., 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011).

are investigative records, or discuss personnel matters. Additionally, other confidentiality laws, the constitutional right to privacy, and attorney-client privilege could also allow or require an agency to withhold information. The burden is on the agency to prove that any record should be withheld.

After applying the relevant law to the facts, the OOR issues a Final Determination. If the parties do not agree with the OOR's Final Determination, interpretation of an affidavit, or legal analysis, they can request judicial review by the appropriate appellate court. The Final Determination is a binding order and if an agency refuses to comply, the agency may be subject to a finding of bad faith and/or sanctions by an appellate court.

While any message can be deleted, concern is heightened with apps where deletion is automatic unless a user intervenes and changes settings to prevent deletion. Deleting a standard text message on a cell phone typically requires an extra step. On Signal, it is much easier-- the user must affirmatively choose "archive," otherwise the messages will automatically be deleted. This leads to a much higher possibility of the loss of agency records; it is also much more challenging, if not impossible, to prove the deletion even occurred.

It is worth noting that if an agency deletes or destroys records, even automatically, after they have been requested, such behavior could lead to a finding of bad faith by the OOR or the courts. Additionally, a court could issue fines and sanctions against an agency for such behavior. This usually involves the use of taxpayer dollars to pay legal costs/fees. Finally, depending on the records involved, the destruction of records could also result in criminal charges. To the OOR's knowledge, the illegal destruction of government records is not a common occurrence in Pennsylvania.

The OOR has addressed Signal or similar apps in Final Determinations.

The OOR has decided approximately 16 appeals involving requests for Signal messages. Here is a selection of some of the relevant Final Determinations.

2024-1052, *Michael Wereschagin and Pittsburgh Post-Gazette v. City of Pittsburgh*

> The agency provided requester screenshots of texts that had been sent using the app. The Requester appealed alleging that more existed. The agency provided affidavits confirming that a reasonable search had been conducted and no additional records were found. The reasonable search entailed asking users if they had any existing text messages.

2024-2536, *Shannon Harris v. Central Bucks School District*

> The agency argued that records did not exist. Affidavits established that the person sending/receiving and only likely custodian of responsive records did not use Signal or similar apps to communicate about agency business.

2024-2480, *Julia Burdelski and Triblive v. City of Pittsburgh*

> The agency provided affidavits confirming that a reasonable search had been conducted and no additional records were found. The agency had individuals conduct a search and confirm the nonexistence of responsive records.

2025-0099, Daly v. Council Rock School District

> The agency provided evidence that a reasonable search had been conducted. Requester's submission of a photo that appeared to show officials texting was insufficient to show that any responsive messages existed.

<u>The Sunshine Act</u>

The core principle of the Sunshine Act is that government business should be conducted in the open, with the public given the opportunity to comment before decisions are made. This transparency is a cornerstone of American democracy and crucial to ensuring accountability.

The use of apps like Signal has the potential to significantly impact public meetings and compliance with the Sunshine Act. It's important to clarify upfront that the Office of Open Records (OOR) does not have jurisdiction or statutory authority to enforce the Sunshine Act or issue advisory opinions related to it. The OOR's only statutory responsibility concerning the Act is created under the RTKL, which involves training agencies and requesters about the Act's provisions. Even in cases of violations, the OOR lacks the authority to determine bad faith or impose sanctions. These powers rest solely with the appropriate law enforcement agencies and the courts.

A key principle of the Sunshine Act is that, with a few exceptions, a quorum of agency officials must deliberate in public. This ensures decisions are not made behind closed doors before the public has a chance to weigh in. While there have always been opportunities to bypass this aspect of the Act—whether through a conversation in a diner, an email exchange, or a casual encounter in a supermarket parking lot—apps like Signal offer a more convenient way to evade accountability. Even when used with the best of intentions, these apps—whether during public meetings or at any other time to discuss agency matters—can breed distrust and create significant legal risks.