Knox McLaughlin Gornall & Sennett, P.C.
Erie • Pittsburgh • Jamestown, NY
814-459-2800 • www.kmgslaw.com

Facebook, the Right-to-Know Law, and the First Amendment: What Public Entities and Officials Need to Know

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What public officials post on Facebook may now be considered to be public records.

On August 16, 2017, the Pennsylvania Office of Open Records (OOR) issued a Final Determination in an appeal from a Right-to-Know Law (the "RTKL") request involving a public official's official Facebook page. This decision not only implicates privacy concerns for local officials, but First Amendment concerns as well.

Public Officials should take notice of this Final Determination as the OOR has for the first time in Pennsylvania determined that **information contained on a public figure's official Facebook page constitute public records subject to disclosure. This includes all associated posts, comments, deleted posts and comments, and Facebook Messenger messages.**

This should serve as a reminder to Public officials to separate their personal Facebook pages from their official Facebook pages, and be conscious of what information is posted on each page.

In *Purdy v. Borough of Chambersburg*, PA OOR Dkt. No.: AP 2017-1299, the OOR determined that the Mayor of Chambersburg's official Facebook page is a public record of the Borough of Chambersburg, and that the posts, comments and Messenger messages relating to the page are subject to disclosure. In *Purdy*, the Right-to-Know request was for:

> Copies of all Facebook posts and associated comment threads from [the Mayor's] public figure Facebook page, relating to or mentioning in any way, the Rail Trail mural proposal that was presented to Borough Council… This is to include all related posts and comments that have been deleted from the Facebook page. In addition, I'm requesting any emails sent from the Mayor's email account(s) and any Facebook Messenger messages related to the mural proposal.

In this case, the Mayor's Facebook page identified him as a "Public Figure, Chambersburg, Pennsylvania" and the Borough's official website linked to the Mayor's Facebook page. The Borough argued that the information on the Facebook page was not a record of the Borough as the Borough has no oversight over the Facebook page, the Borough did not authorize or require the Mayor to have an official Facebook page, and the Borough's network firewall blocks the use of Facebook. The OOR, however, decided that such matters were immaterial.

The OOR found that the posts, comments and Messages on the Facebook page were a record of the Borough as the Facebook page had a direct nexus to the operations of the Borough. The OOR discussed that the Borough operates through its elected officials, the Facebook page contained discussions, posts, comments and messages related to the Mayor's duties, and the page contained contact information for the Borough. Accordingly, the OOR determined that this Facebook page was an extension of the government entity.

Significantly, the Final Determination also specifically declared that *deleted* posts, comments and Facebook Messenger messages were also subject to disclosure.

One layer of analysis that was not discussed at great length or with much specificity within the Final Determination was the question of possession. The RTKL provides that "a record in the possession of a… local agency shall be presumed to be a public record." 65 P.S. §67.305(a). The OOR appears to attempt to address the matter of possession in a roundabout way by following the line of analysis that the local agency is the Borough, the Borough government is made up of elected officials, and that the Mayor is an elected official; thus, the information on the Mayor's public figure page constitutes a record in the possession of the Borough. In making this ruling the OOR also gave great weight to the fact that the Facebook page was listed on the Borough's website, thus providing some level of implied endorsement. This may be a line of analysis that we will see addressed in future appeals.

Also, it is important to note that possession is only half of the analysis, and that the record must still be determined to be a public record subject to disclosure. The OOR addressed this by noting that the Facebook page "contains discussions and posts regarding activities within the Borough, including those relating to the police department and council members, and contains contact information for the Borough," which fulfils the requirement that the record "document a transaction or activity of the agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 P.S. §67.102.

This Final Determination also raises an underlying concern regarding the deletion of comments and/or posts and whether, when doing so on an official Facebook page without restriction, you are potentially offending the commenter's First Amendment rights.

The United States Supreme Court has stated that there are three different public forums in which public speech may occur. Perry Educ.Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983). These include a Traditional Public Forum or Open Forum, a Limited Public Forum, and a Non-Public Forum. A review of a Non-Public Forum is not applicable to this discussion.

A Traditional Public Forum, or Open Forum, is in a space which has "by long tradition or government fiat[ ] been devoted to assembly and debate." *Id*. at 45. Such spaces would include public parks, sidewalks, etc. In an Open Forum, the government may not limit public speech without a "compelling interest" to do so.

A Limited Public Forum, however, is created in a space where the government has allowed public expressive activity to occur, but is a space where the government may limit the speech if the government has indicated a clear intent to do so. An example of a Limited Public Forum would be in a public meeting where the government agency may limit offensive speech.

While the application of Open or Limited Public Forums has not specifically been applied by the courts to government Facebook pages, it is our opinion that unless official government Facebook pages are declared to be Limited Public Forums, the manager of that page is unable to delete or otherwise restrict comments.

Accordingly, we recommend that government entities and government officials take the appropriate steps to declare their Facebook pages to be Limited Public Forums. This would allow for the monitoring and/or deletion of offensive and inappropriate comments much in the same way that you would limit such speech during a public meeting. Government entities and public officials should be sure to consult with their solicitors to determine how to declare their official Facebook pages as limited public forums.

In light of this Final Determination, we suggest the following:

- **Public officials should separate their personal Facebook pages from their official Facebook pages, and be conscious of what information is posted on each page.**
- **Public officials should be cognizant of how and where their official "public official" Facebook pages are linked.**
- **Government entities and government officials should take the proper steps to declare their Facebook pages to be "Limited Public Forums" so as to avoid unintentional First Amendment violations when deleting or editing comments on the pages.**



Timothy S. Wachter

As a member of the Governmental, Public Finance & Bonds and Business & Tax Practice Groups, and as lead for Knox Law Public Strategies, Timothy S. Wachter regularly advises governmental, business and nonprofit clients on highly complex legal, regulatory and public policy related matters.

twachter@kmgslaw.com • 814-923-4904

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