



pennsylvania

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

2015 Annual Right to Know/Sunshine Law Training

Phone Number: 717.346.9903

<http://openrecords.pa.gov>

@OpenRecordsPa

Right-to-Know Law

65 P.S. § §67.101, *et. seq.*

- Effective January 1, 2009
- **Key Change**

Presumption of Openness:

- ***Every*** record of an Agency is ***presumed*** to be Public.
- Agency bears burden to prove record is not public.

WHO is subject to the RTKL?

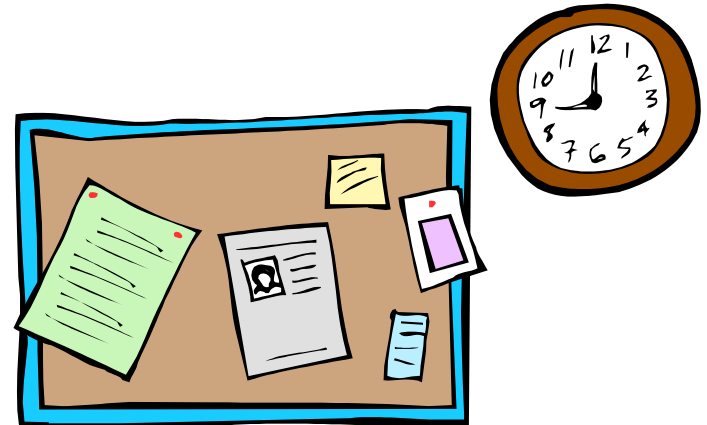
- Commonwealth Agencies
- Local Agencies
- Legislative Agencies
- Judicial Agencies

Agency Obligations

- Must appoint an Agency Open Records Officer (“AORO”).
- May promulgate regulations and policies necessary for the agency to implement the RTKL.
- May create your own Request Form, but must accept the Uniform Request Form developed by the OOR.
- Should provide the OOR with the name and contact information for your AORO

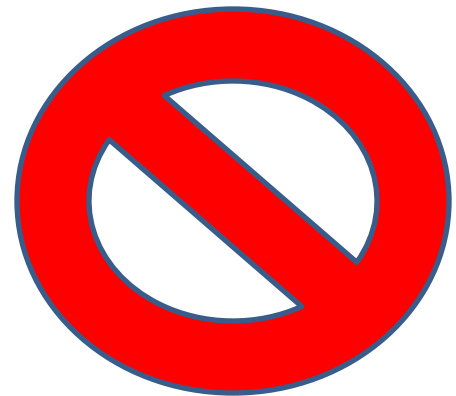
Postings

- On your bulletin boards and if you have a website:
 - Contact information for the AORO.
 - Contact information for the applicable appeals office.
 - A form to file a Request.
 - Regulations, policies and procedures of the agency related to the RTKL.



Prohibitions – Section 1308

- An agency may not adopt a policy or regulation which:
 1. Limits the number of records which may be requested or made available for inspection or duplication; or
 2. Requires disclosure of the purpose or motive in requesting access to records.



- Definition of a Record:

“Any information **regardless of its physical form or character** that documents a transaction or activity of an agency **AND** is created, received, or retained pursuant to law **OR** in connection with a transaction, business or activity of an agency.”

What are Records?

Any information, regardless of its physical form.

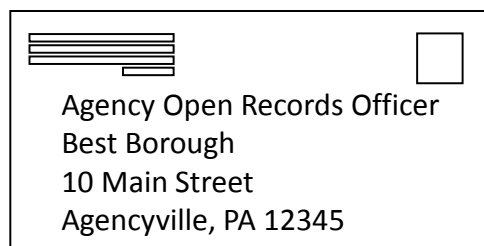
- Paper
- Emails
- Phone records
- Text messages
- Blueprints
- Audio recordings
- Security camera footage
- Vehicle data recorders
- Dash/body camera video recordings

Who can make Requests?

- Any person that is a **legal resident of the United States.**
- The term includes agencies and corporate entities, not just humans.

Receiving Requests

- An agency is not required to (but may!) respond to verbal requests. Only written requests avail a Requester of the appeals process.
- A request must be accepted by facsimile, email, regular mail and/or in person.



What is a proper Request?

- A request for records should be addressed to the AORO; but, if not, all agency employees are REQUIRED to forward the Request to the AORO.
- A request must seek records – not ask questions.
- A request must be “sufficiently specific to enable the agency to ascertain which records are being requested.”

65 P.S. §67.703.

Receiving a Request.

- Upon receipt, AORO shall:
 - note the date of receipt on the written request;
 - Compute the date on which the five (5) day response period will expire and note that date on the written request;
 - Maintain a copy of the Request until it is fulfilled;
 - If denied, Request must be kept for 30 days or, if appealed, until the OOR issues the Final Determination.
 - Commonwealth agencies must retain all Request related correspondence.

Third Party Notification

- **Proprietary Information** (Section 707(b)):
 - An agency shall notify a third party of a request for a record if:
 - the third party provided the record and
 - included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information.
- **Personal Identification Information**
 - Agencies also notify third parties who are the subject of requested records.

Third Party Records

Records in possession of a 3rd party contractor may also be subject to access IF:

- a) The record is in the possession of a party with whom the agency has contracted
- b) to perform a governmental function and
- c) is not exempt under the RTKL

65 P.S. Section 67.506(d)

The requisite “governmental function” is the “delegation of some non-ancillary undertaking of government.”

See *SWB Yankees LLC v. Wintermantel*, No. 44 MAP 2011, 45 A.3d 1029, 1042 (Pa. 2012)

Agency Response

- Agency must SEND the written response to a request within 5 business days.
 - **“Agency business days”**
 - A mailed response is not required to be RECEIVED within five (5) business days; however, it must be placed in outgoing mail within that time frame.

Extensions

- Agencies may unilaterally invoke a **30 Calendar Day Extension** if:
 - It is done within the initial 5 business day window
 - It is done in writing to the requestor
 - A reason is provided consistent with Section 902
 - A date is provided that the requestor can expect a response
 - An estimate of costs is given.
 - **5 + 30 application per Section 902(b)(2)**

Payment Issues

- Agency is only required to provide the record in the current medium
- Cannot charge for electronic records
- **Must allow Requester to use their own equipment to make copies**
- Cannot charge for labor/redaction/legal review
- Can only charge the actual cost/pass-through costs

More Payment Issues !

- No surprises. Contact the requestor with an estimate before the work starts.
- Mutual exchange, **but payment is due first**
- An Agency may require pre-payment if the fees are expected to exceed \$100.
- Hold responses for 60 days before discard
- Denial for non-payment of previous requests

Denying Access

- A denial must include:
 - A description of the requested record
 - The legal and factual grounds for denial
 - Name, title, signature, business address and phone number of AORO
 - Date of response
 - The procedure to file an appeal with the applicable appeals office.

Criminal Investigative records have a special appeal procedure!

- ✓ If the record requested is being denied pursuant to Section 708(b)(16) as relating to a criminal investigation, local agencies must direct the requester to file the appeal to the local District Attorney's Office. Not the OOR.

Disruptive Requests

- An agency may deny access to a record if the Requester has:
 1. Made repeated requests for that SAME record and;
 2. The repeated requests have placed an unreasonable burden on the agency.

65 P.S. Section 67.506.

The RTKL is not a confidentiality law

- An agency may exercise its discretion to make any otherwise exempt record accessible if:
 1. Disclosure is not prohibited by Federal or State law or regulation; and
 2. The record is not protected by privilege; and
 3. The agency head determines that public interest favoring access outweighs any interest favoring withholding.

Section 708(b) Exemptions

1. Personal security
2. Public safety
3. Infrastructure security
4. Computer security
5. Medical records
6. Personal identification information; home address of law enforcement officer and judge; *does not exempt* name, salary of public employee;
7. Employee records
8. Labor negotiations
9. Draft records
10. Predecisional deliberations and strategy to adopt budget or regulation
11. Trade secrets
12. Personal notes
13. Donor identity
14. Scholarly records
15. Academic transcripts
16. Records related to a criminal investigation

Section 708(b) Exemptions

- | | |
|---|--|
| <ul style="list-style-type: none">17. Records related to a noncriminal investigation18. 911 records19. DNA and RNA records20. Autopsy records except name and cause and manner of death21. Draft meeting minutes (but not audio recordings)22. Appraisals prior to decision to proceed with project23. Library and archives | <ul style="list-style-type: none">24. Rare documents25. Archeological site26. Proposals and bids27. Correspondence with insurance carrier28. Social services records29. Correspondence between an individual and a member of the General Assembly30. Record identifying the name, home address, date of birth of a minor |
|---|--|

Agency Best Practices

- Send AOROs to training
- Appoint an alternate AORO
- Train all staff to forward requests to the AORO
- Issue agency e-mail accounts and phones
- Use your web sites as business platforms
- Post RTKL requests with responses
- Develop a Records Retention Policy

Filing an Appeal

If the agency denies or deem denies a Request, an appeal may be filed within **OOOR 15 business days** of the mailing date of the Agency's response or date of the deemed denial (whichever first).

Is it a Proper Appeal?

- All appeals are reviewed to make sure they include the following documents:
 - ☑ A copy of the Right-to-Know Request.
 - ☑ A complete copy of the agency's response.
 - Unless an alleged deemed denial.
- The appeal must also meet the requirements of Section 1101(a).
 - ✓ Requester MUST state why he believes the record is public.
 - ✓ Requester MUST address all grounds that the Agency raised in its denial.

FAILURE TO FILE A PROPER APPEAL WILL RESULT IN DISMISSAL

OOR Docketing Letter



Walter Torain, BN4486
SCI-Mahanoy
301 Morea Road
Frackville, PA 17932

October 25, 2012

Andrew Filkosky
Agency Open Records Officer
PA Dept. of Corrections
1920 Technology Parkway
Mechanicsburg, PA 19120

RE: OFFICIAL NOTICE OF APPEAL - DOCKET # AP 2012-1816

Dear Parties:

Please review the information below carefully as it affects your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.* ("RTKL") on October 25, 2012. The process to follow in submitting information to the OOR is attached. A Final Determination will be issued in 30 calendar days as set forth in the RTKL.

You may submit information and legal argument to support your position by 5:00 p.m. seven (7) business days from the date on this letter. Please include the docket number above on all submissions.

Your position must be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Determinations of the OOR. **Statements of fact must be supported by an affidavit made under penalty of perjury by a person with actual knowledge.**

An affidavit is required to demonstrate nonexistence of records.

Any written communication with the OOR must be provided to all parties.

The agency has the burden of demonstrating that records are not subject to public access. Any bases for denial of records not raised in the agency's original response to the request are waived and will not be considered. See *Signature Information Solutions, LLC v. Aston Township*, 995 A.2d 510.

Agency Notification of Third Parties: In the event records requested concern or pertain to an employee of the agency; constitute proprietary, confidential or trademark records of a third party; or are held by a third party contractor, **the agency must notify such parties of this appeal immediately and provide proof of that notice to the OOR**

Use mailing date of letter to calculate 7 business day submission period.

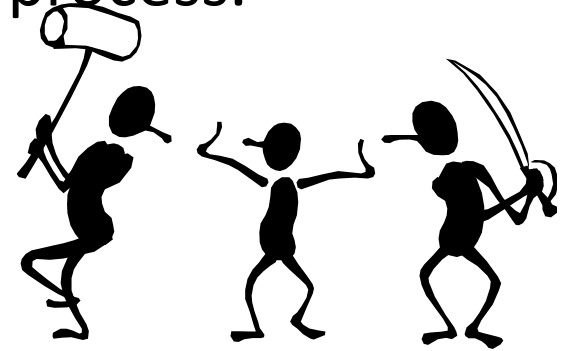
Affidavit is required to support facts.

Communication to OOR must include the other party.

Provide notice of appeal to relevant third parties.

Appeal Options: Mediation

- Either party may [request mediation](#) as an alternative to the traditional “adversarial” appeals process.
- If mediation is unsuccessful, the appeal is transferred to a different appeals officer for issuance of a final determination.
- Particularly effective where the Request is broad or covers a large number of records that are responsive to the Request, but which the Requester may not have intended to seek.



Appeal Options: *In Camera* Review

- *In Camera* review is a process where the agency provides the OOR appeals officer with an unredacted copy of the denied record.
- The appeals officer will review the record and determine whether the asserted exemption applies.
- The Requester is not given access to the record being reviewed *in camera*.
- Particularly useful where the agency wishes to withhold a record, but is unable to publicly provide supporting facts without revealing the very information alleged to be exempt.

Final Determinations

- Are issued within 30 days of receipt of an appeal unless Requester agrees to an extension.
- Are legally binding final orders.
- Available for review on OOR website, Lexis, and Westlaw

Petition for Reconsideration

- The OOR accepts Petitions for Reconsideration (PFR) of its Final Determinations if such Petition is filed within 15 days after the issuance of a Final Determination.
- The application must be made by petition, stating specifically the grounds relied upon, and served upon the other party.
- A PFR does not toll the time frame to file a judicial appeal.

For more guidance: See the [OOR website](#)

Judicial Review



- Within thirty (30) days of the mailing date of an OOR Final Determination, any party may file a judicial appeal. 65 P.S. § 67.1302(a).
 - Local agency appeals are to be filed with Court of Common Pleas in the agency's county.
 - Commonwealth agency appeals are to be filed with the Commonwealth Court.
- The OOR must be served notice of the appeal, but the OOR is not a party and should not be named in the caption.

Penalties and Attorneys Fees – Section 1304

- If a court holds that records were denied based on an unreasonable interpretation of law, or in bad faith, an Agency can be required to pay attorneys' fees.
- If a Requester's appeal is deemed frivolous by the court, the Requester can be required to pay the agency's attorney fees.
- \$1,500 penalty if an Agency denies access to a public record in bad faith.
- \$500 per day when an Agency does not promptly comply with a judicial court order to release records under the RTKL.

Additional Resources

- www.OpenRecords.pa.gov
 - Citizens Guide
 - Agency Guides
 - Final Determinations and Key Court Decisions
- Open Records Officer Guidebook
- On Site Training = RA-DCOORTRAINING@pa.gov
- Twitter Feed = @OpenRecordsPa
- OOR Phone = 717.346.9903