



pennsylvania

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

OOR Annual Training

October 23, 2017

<http://openrecords.pa.gov>

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(717) 346-9903

Submit questions for panel discussion at
openrecords@pa.gov

Appeals Filed by Year

2012 2,188 appeals

2013 2,478 appeals

2014 2,017 appeals

2015 2,926 appeals

2016 2,102 appeals

2017 1,919 appeals (as of Oct. 20)

Act 22 of 2017

Governs access to police video & audio

- Act 22 applies to “any audio recording or video recording made by a law enforcement agency”
- The Right-to-Know Law does not apply to requests for police video & audio
- New page on OOR website
 - <http://openrecords.pa.gov>

Act 22 of 2017

Act 22 defines “law enforcement agency” as:

- Office of the Attorney General;
- District Attorney’s Office; or
- Agency that employs a law enforcement officer
 - “Law enforcement officer” includes “an officer of the U.S., the Commonwealth or a political subdivision ... who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter ..., a sheriff or deputy sheriff and any attorney authorized by law to prosecute or participate in the prosecution of the offense”

Act 22 of 2017

Requests must:

- Be sent within 60 days of recorded event
- Be sent to law enforcement agency's AORO
- Include date & time of event
- Include requester's relationship to event
- If recording was inside a residence, identify every person present (unless unknown & not reasonably ascertainable)

Act 22 of 2017

Response from agency – within 30 days:

- 30 calendar days to respond
- May (w/ MOU) engage DA or AG to respond
- May deny request if recording includes:
 - Potential evidence in a criminal matter; or
 - Information pertaining to an investigation or a matter in which a criminal charge has been filed; or
 - Confidential information or victim information; and
 - Reasonable redaction will not safeguard the potential evidence or the information

Act 22 of 2017

Response from agency:

- Granted requests can charge “reasonable fees” (undefined) for copy of recording
- If no response issued in 30 days, deemed denied & can be appealed

Act 22 of 2017

Appealing an agency denial:

- 30 days to file an appeal
- Appeal to appropriate Court of Common Pleas
 - \$125 filing fee
 - Copies of request & any responses
 - Proof AORO was served with appeal
 - If inside a residence, must also serve everyone who was in the residence unless unknown & not reasonably ascertainable

Act 22 of 2017

Discretionary Release of Recordings

- Nothing in Act 22 precludes a law enforcement agency or a prosecuting attorney with jurisdiction from choosing to release an audio or video recording, with or without a written request
 - In certain cases, the law enforcement agency can only release the recording with the written permission of the prosecuting attorney

First-Ever AORO Survey

The OOR surveyed AOROs earlier this year

- 1,289 responses
- Agencies from all 67 counties responded
- Agencies of all types responded
 - Local & state
 - Large & small
- Full results will be available later this month
- LBFC also doing a survey (HR 50)

First-Ever AORO Survey

Agencies responding to OOR survey...

- 48.0% Townships (614)
- 16.1% School Districts (206)
- 13.1% Boroughs (167)
- 5.9% Police Departments (76)
- 5.6% Authorities (71)
- 3.0% Counties (38)
- Also: Charter Schools (34), Commonwealth Agencies (30), Cities (15), and Other (28)

First-Ever AORO Survey

How many Right-to-Know requests did your agency receive last month (January 2017)?

- 86.8% of agencies received 5 or fewer
- 3.0% of agencies received 20 or more

How many Right-to-Know requests did your agency receive last year (2016)?

- 57.9% of agencies received 10 or fewer
- 6.9% of agencies received 101 or more

First-Ever AORO Survey

In an average work week, how many hours does your agency spend responding to RTK requests?

- 0-1 hours 73.1%
- 2-5 hours 18.9%
- 6-10 hours 4.6%
- 11-20 hours 1.7%
- 21-40 hours 0.8%
- 41+ hours 0.9%

First-Ever AORO Survey

Of the requests received in 2016, how many were from commercial requesters?

- 58.9% of agencies received 5 or fewer
- 4.3% of agencies received 51 or more

How many of your agency's RTK responses were appealed to the OOR in 2016?

- 93.0% of agencies had 0 appeals or 1 appeal
- 0.3% of agencies had 21 or more appeals



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George Spiess, Training Coordinator

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Right-to-Know Law

65 P.S. § §67.101, *et. seq.*

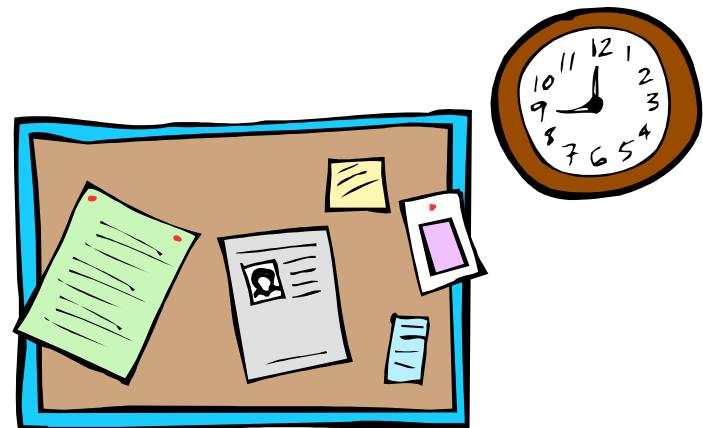
- Effective January 1, 2009
- **Key Changes**
 - **Presumption of Openness:**
 - ***Every*** record of an Agency is ***presumed*** to be Public.
 - Agency bears burden to prove record is not public.
 - **Creation of the Office of Open Records (OOR)**

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

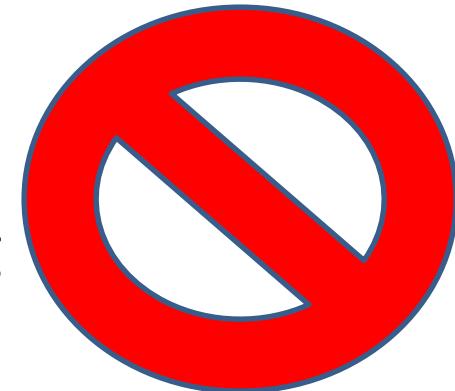
Postings

- 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.



What is a “Good” Request?

- It is addressed to the Open Records Officer
- It seeks a record
- It is Sufficiently Specific

- 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.”

Sufficiently Specific

- Subject – must identify a transaction or activity of the agency for which the record is sought
- Scope – must identify a discreet group of documents either by type or recipient
- Timeframe – needs to be finite

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 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.
 - “Your 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 if not picked up.
- 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.

The RTKL is not a confidentiality law

- Records can be released outside of the RTKL.
- 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.

Filing an Appeal

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

A Complete Appeal...

- Includes the original Request
- Includes the Agency Response, if one is provided
- Includes your statement about why the requested records are public
- Includes a statement addressing any grounds cited by the agency for denying your request

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 Final 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 trademarked 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.

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

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.

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.

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](https://twitter.com/OpenRecordsPa)
- OOR Phone = 717.346.9903



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Charles Brown, Chief Counsel

OOR Annual Training October 23, 2017

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Current Case Law

Pa. State Educ. Ass'n v. Commonwealth, No. 11
MAP 2015, No. 22 MAP 2015, SUPREME COURT
OF PENNSYLVANIA, 148 A.3d 142; 2016 Pa. LEXIS
2337; 41 I.E.R. Cas. (BNA) 1310, April 5, 2016,
Argued, October 18, 2016, Decided

Current Case Law

Pa. State Police v. Grove, No. 25 MAP
2016, SUPREME COURT OF PENNSYLVANIA, 161
A.3d 877; 2017 Pa. LEXIS 1394, September 14,
2016, Argued, June 20, 2017, Decided

Current Case Law

McKelvey v. Office of AG, No. 1931 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 2017 Pa. Commw. LEXIS 808, June 7, 2017, Argued, October 13, 2017, Decided, October 13, 2017, Filed

Current Case Law

[UnitedHealthcare of Pa., Inc. v. Baron](#), No. 1357
C.D. 2016, No. 1358 C.D. 2016, No. 1427 C.D.
2016, COMMONWEALTH COURT OF
PENNSYLVANIA, 2017 Pa. Commw. LEXIS
788, June 7, 2017, Argued, October 5, 2017,
Decided, October 5, 2017, Filed

Current Case Law

Port Auth. of Allegheny Cty. v. Towne, No. 92
C.D. 2017, COMMONWEALTH COURT OF
PENNSYLVANIA, 2017 Pa. Commw. LEXIS
702, June 9, 2017, Submitted, September 12,
2017, Decided, September 12, 2017, Filed

Current Case Law

Phila. Dist. Atty's Office v. Cwiek, No. 1284 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 2017 Pa. Commw. LEXIS 683, February 24, 2017, Submitted, September 6, 2017, Decided, September 6, 2017, Filed

Current Case Law

[Capinski v. Upper Pottsgrove Twp.](#), No. 1968 C.D. 2015, COMMONWEALTH COURT OF PENNSYLVANIA, 2017 Pa. Commw. LEXIS 358, September 13, 2006, Argued, June 14, 2017, Decided, June 14, 2017, Filed

Current Case Law

Highmark Inc. v. Voltz, No. 1325 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 163 A.3d 485; 2017 Pa. Commw. LEXIS 293, March 8, 2017, Argued, June 2, 2017, Decided, June 2, 2017, Filed

Current Case Law

[Office of the DA of Phila. v. Bagwell, CASES](#)
CONSOLIDATED Nos. 2627, 2641 C.D. 2015
CASES CONSOLIDATED Nos. 435, 473 C.D.
2016, COMMONWEALTH COURT OF
PENNSYLVANIA, 155 A.3d 1119; 2017 Pa.
Commw. LEXIS 30, October 7, 2016,
Submitted, February 16, 2017,
Decided, February 16, 2017,
Filed, Reconsideration denied by Office of the
Da of Phila. v. Bagwell, 2017 Pa. Commw. LEXIS
105 (Pa. Commw. Ct., Apr. 12, 2017)

Current Case Law

[Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.](#), No. 66 M.D. 2015, COMMONWEALTH COURT OF PENNSYLVANIA, 151 A.3d 1196; 2016 Pa. Commw. LEXIS 551; 45 Media L. Rep. 1509, November 15, 2016, Argued, December 19, 2016, Decided, December 19, 2016, Filed

Current Case Law

Municipality of Mt. Lebanon v. Gillen, No. 1020 C.D. 2016, No. 1021 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 151 A.3d 722; 2016 Pa. Commw. LEXIS 538, November 14, 2016, Argued, December 9, 2016, Decided, December 9, 2016, Filed, Appeal denied by Municipality of Mt. Leb. v. Gillen, 2017 Pa. LEXIS 1154 (Pa., May 23, 2017)

Current Case Law

[Commonwealth v. Walsh/Granite JV](#), No. 246 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 149 A.3d 425; 2016 Pa. Commw. LEXIS 462, September 15, 2016, Argued, October 31, 2016, Decided, October 31, 2016, Filed

Current Case Law

Pa. Game Comm'n v. Fennell, No. 1104 C.D. 2015, COMMONWEALTH COURT OF PENNSYLVANIA, 149 A.3d 101; 2016 Pa. Commw. LEXIS 451, December 11, 2015, Submitted, October 26, 2016, Decided, October 26, 2016, Filed

Current Case Law

Phila. Dist. Attorney's Office v. Stover, No. 1952
C.D. 2016, COMMONWEALTH COURT OF
PENNSYLVANIA, 2017 Pa. Commw. Unpub. LEXIS
679, April 21, 2017, Submitted, September 12,
2017, Decided, September 12, 2017, Filed

Current Case Law

Brown v. Dep't of Corr., No. 1959 C.D. 2016, COMMONWEALTH COURT OF PENNSYLVANIA, 2017 Pa. Commw. Unpub. LEXIS 653, August 4, 2017, Submitted, September 1, 2017, Decided, September 1, 2017, Filed



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Mediation

The Right-To-Know Law (RTKL) authorizes the Office of Open Records (OOR) to establish an informal mediation program to resolve RTKL disputes (see 65 P.S. § 67.1310(a)(6)). This is a voluntary process to help parties reach a mutually agreeable settlement on records disputes before the OOR.

To view more information on mediation please visit the OOR website at:

<http://www.openrecords.pa.gov/Appeals/Mediation.cfm>

Submit questions for panel discussion at
openrecords@pa.gov

Regulations

The Office of Open Records ("OOR") is in the process of promulgating procedural regulations as authorized by Section 504(a) of the [Right-to-Know Law](#) ("RTKL").

To view the current draft regulations and receive updates on the regulatory process please visit the OOR website at:

<http://www.openrecords.pa.gov/RTKL/Regulations.cfm>