



# pennsylvania

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

## **Pittsburgh Post-Gazette**

*October 1, 2019*

<https://openrecords.pa.gov>

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# Right-to-Know Law Basics

## The basic RTKL process looks like this:

- Requester submits request to state or local agency
  - Request must seek records
- Agency responds: grant, deny, or mix of both
- If request is denied (even in part), requester can appeal to OOR
- OOR issues a binding final determination
- Either side can appeal to court (happens <10% of the time)
  - Court of Common Pleas for local agencies
  - Commonwealth Court for state agencies

# What is a Record?

## A record is...

- “information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency” – Section 102 of RTKL
- *PA Office of Attorney General v. Philadelphia Inquirer* (No. 2096 C.D. 2014, decided Nov. 19, 2015)

# Records Take Many Shapes

## The Right-to-Know Law...

- **Doesn't** distinguish between formats
  - Paper, email, texts, social media, audio, video, etc.
- **Doesn't** distinguish between agency & personal devices
  - Or between agency & personal email accounts
  - Or between agency & personal social media accounts
- All that matters: Is it a **record**? And if so, is it a **public record**?

# Right-to-Know Law Basics

All state & local government records **presumed** to be public

- 30 exceptions in the RTKL
  - Fewer apply to financial records & aggregated data
- Exceptions in other laws & regulations (e.g., HIPAA, FERPA)
- Attorney-client privilege & other privileges
  - Only if recognized by PA courts; not “self-critical evaluation”
- Records can be made non-public by court order
- When a denial is appealed, agency bears burden of proof

# How to File a RTK Request

## Submit your RTK request to the **correct agency**

- Submit requests to the agency that has the record
  - Rarely the OOR – we receive >900 misdirected requests every year
- Address requests to Agency Open Records Officer (AORO)
- AORO database available on OOR website

### Open Records Officer Search

Agency Name

County

Cumberland ▼

Type

Local ▼

Search

Reset

# More About Agency AOROs

## Many agencies, but not all, have a single AORO

- Commonwealth agencies: DEP, DCNR, DOC, DCED, etc.
- Some agencies have separate AOROs by bureau, dep't, etc.
  - e.g., Philadelphia has approximately 40 AOROs
- Important to send request to the right AORO
  - If not sure, say so: "If this request is misdirected, please let me know so I can withdraw it and direct it to the proper AORO."

# How to File a RTK Request

## Some basic steps:

- Use the appropriate form to request records
  - Agencies must accept the OOR's Standard RTK Request Form
  - If agency has its own form, strongly consider using that one
- Be **specific** when describing records: subject matter, date(s), type of record, sender and/or recipient, etc.
- **Note the request date to track timing of response**



# How to File a RTKL Request

## OOR Standard RTK Request Form, part 1



### Standard Right-to-Know Law Request Form

*Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.*

**SUBMITTED TO AGENCY NAME:** \_\_\_\_\_ (Attn: AORO)

Date of Request: \_\_\_\_\_ Submitted via: ☐ Email ☐ U.S. Mail ☐ Fax ☐ In Person

#### PERSON MAKING REQUEST:

Name: \_\_\_\_\_ Company (if applicable): \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Email: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☐ U.S. Mail

**RECORDS REQUESTED:** *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.*

\_\_\_\_\_

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City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Email: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

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\_\_\_\_\_

# How to File a RTKL Request

## OOR Standard RTK Request Form, part 2

DO YOU WANT COPIES?

- ☐ Yes, electronic copies preferred if available
- ☐ Yes, printed copies preferred
- ☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want [certified copies](#)? ☐ Yes (*may be subject to additional costs*) ☐ No

RTKL requests may require payment or prepayment of fees. See the [Official RTKL Fee Schedule](#) for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$\_\_\_\_\_.

### ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: \_\_\_\_\_ Date Received: \_\_\_\_\_ Response Due (5 bus. days): \_\_\_\_\_

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: \_\_\_\_\_) Actual Response Date: \_\_\_\_\_

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$\_\_\_\_\_

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.  
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Nov. 27, 2018



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Form updated Nov. 27, 2018

# Timeline of a RTKL Response

Every state & local agency **must** respond to RTK requests

- Must respond in writing **within 5 (agency) business days**
  - If no response received, request is deemed denied
  - Allow additional 3 business days for postal mail before filing appeal
- Agency can extend timeline by 30 calendar days
  - Must be done in writing within the initial 5 business days
  - Any other extension must be agreed to by requester & in writing
- Track all **dates & deadlines** in case you need to appeal

# Tracking Dates: An Example

## Oscar Olsen v. Local Agency

- Aug. 1, 2019 – request made (on a Thursday)
- Aug. 8, 2019 – agency took 30-day extension (to Sept. 7)
  - Sept. 7 is a Saturday, so deadline moves to Monday, Sept. 9
- Sept. 12, 2019 – agency emails, asks for 30 more days
  - Requester emails back, says that's fine
- Oct. 1, 2019 – agency issued response (denied in part)
- Oct. 1, 2019 – requester filed appeal with OOR
  - Request was deemed denied on Sept. 9; appeal was due on Sept. 30
  - OOR has no choice but to dismiss appeal as untimely



# **Agency Response: Costs & Format**

## **OOB fee schedule developed pursuant to RTKL**

- No charge for electronic records
  - Redactions may necessitate printing electronic records
- Up to \$0.25/page for hard copies (8.5 x 11)
- Requesters can photograph records they asked to inspect
- Agencies do not have to create a record
- Agencies required to provide records in medium requested (electronic vs. hard copy)

# Agency Response: Denials

If an agency denies a request, it is required by the RTKL to:

- Provide the denial in writing
- Explain what records are being withheld
- Explain why records are being withheld
- Explain how to appeal the denial
- Failure to respond by the statutory deadline is a “deemed denial” & can be appealed

# **Writing a Good RTK Request:**

## **1. Seek Records, Don't Ask Questions**

### **Requests should seek records, not ask questions**

- RTKL gives access to public records – not a venue for questions
  - Why did the Chairman vote yes?
    - Request meeting minutes & audio recording of meeting
  - Why did Pileggi Lumber get this contract?
    - Request copies of all submitted bids & council emails re: Pileggi Lumber
- Agencies may deny requests which ask questions

# Writing a Good RTK Request:

## 2. Be Specific

### Specificity is determined on a case-by-case basis

- Primary goal is to enable agency to know what to look for
- Vast “fishing expeditions” are not permitted
- Phrases like “any and all” & “but not limited to” raise questions
  - “Any and all documents, including but not limited to emails, memos, and spreadsheets, regarding the 2018 Pine Street Bridge Project”
- Poor storage & organization of an agency’s records is not held against the requester

## More About Specificity

Specificity is a 3-part test: *Pa. Dep't of Educ. v. Post-Gazette*

- **Subject Matter:** Identify 'transaction or activity' of the agency
- **Scope:** Identify discrete group of docs (e.g., type or recipient)
- **Timeframe:** Identify a finite period of time
  - This is the most fluid factor – failure to identify a finite timeframe will not automatically render a request overbroad & a short timeframe will not make an overbroad request specific
  - Timeframe can be implied (e.g., “the ongoing Pine Street repaving”)

# Specificity: Examples

## Commonwealth Court cases on specificity:

- *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*: A request seeking all of the emails of the Acting Secretary of Education “as they pertain to the performance of her duties as Acting Secretary since she was appointed on Aug. 25, 2013 to date [Aug. 5, 2014]” was found to be insufficiently specific because “it is, by virtue of the Secretary’s position, a request for emails about all of the agency’s activity overly nearly a one year period. In other words, it is a fishing expedition”

# Specificity: Examples

## Commonwealth Court cases on specificity:

- *Dep't of Env'tl. Prot. v. Legere*: A request for 4 years of Section 208 determination letters was sufficiently specific despite the scope of the request because the subject matter was extremely specific
- *Dep't of Corr. v. St. Hilaire*: A request for “all records” documenting inmate injuries or death for five years was sufficiently specific because the request had clear parameters even though a large number of records were implicated

# Specificity: Keywords

## Beware of using **only** keywords!

- *Office of the Governor v. Engelkemier*: Request for all emails from Chief of Staff Katie McGinty from January 2015 to July 2015, with **keywords**, was sufficiently specific – *but note discussion about Office waiving specificity argument earlier in the process and potential for “broad” keywords to be insufficiently specific*
- **Be careful when using keywords!**
  - Request **must still identify a transaction or activity** of the agency



# Specificity: Keywords

## When keywords go wrong

- Emails from Erik Arneson containing the keyword “Arneson”
- Emails & texts containing “concern,” “concerned,” “concerning,” “complaint,” “complained,” “complaining”
- Emails containing “the,” “it,” “is,” “and”
- Bottom Line: Keywords can be helpful, but relying on keywords alone is risky (e.g., “One way to satisfy my request would be to search Jane Smith’s emails for keywords “John Doe” and “suspension”)

## **Writing a Good RTK Request:**

### **3. Think Twice Before Requesting a List**

#### **Requesting a “list” can be problematic**

- If no actual list exists, agency not required to create one
  - “List of all lawsuits filed against the agency in 2017”
  - “List of all properties with zoning violations, 2015 to present”
- Better to seek records containing the information you want
  - “Records showing captions of lawsuits filed against agency in 2017”
  - “Records showing zoning violations issued, 2015 to present”
- Valid to add: “If info can be provided in a list, please do”

# **Writing a Good RTK Request:**

## **4. Accessing Information in Databases**

### **Information in databases subject to presumption of openness**

- Learn about the database software used by the agency
  - If possible, learn capabilities of program/database – ask if unsure
  - How do agency employees extract info from database
- Terminology can be important – use agency jargon if possible
  - Create, export, compile, format, CSV, TXT, comma-delimited...

# Writing a Good RTK Request:

## 4. Accessing Information in Databases

### Suggesting queries can be helpful

- Where relevant, consider suggesting specific queries
  - Queries may be necessary for extracting information
  - Suggested queries can help focus agency searches
- But **always** identify the transaction or activity of the agency
  - Relying only on suggested queries can be risky & lead to a denial
  - Remember: RTKL requires **specificity** in requests & first step is identifying a transaction or activity

# Databases: Commonwealth Court

## Gingrich v. Pennsylvania Game Commission (2012)

- Records related to deer harvest & habitat
- “Requesters may provide suggestions or examples in order to better inform an agency about the information requested, and we have no desire to discourage that practice.”
- “Providing data from an agency database **does not constitute creating a record**. ... [I]nformation contained in a database must be accessible to requesters and provided in a format available to the agency.”

# Databases: Commonwealth Court

## Department of Environmental Protection v. Cole (2012)

- Records related to rebates for solar energy projects
- Commonwealth Court: “[A]n agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. In short, to the extent requested information exists in a database, it must be provided ... To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases.”

# Databases: Additional Cases

## Intersection of RTKL & databases still being developed

- Agency may be made to **prove query was properly structured**
  - OOR [2017-1761](#): Violent crime data from Pittsburgh
- Don't be **overly specific** & hurt your request
  - OOR [2016-2041](#): Sought TXT or CSV, records only available in PDF
- Law currently only specifies **electronic vs. hard copy**
  - OOR [2017-0426](#): Sought “comma- or tab-delimited,” provided in PDF
  - OOR [2016-1591](#): When available in native PDF, records must be provided in that format as opposed to scanned PDF

# Speaking of Databases...

## Two useful resources:

- Online Contract Database, <http://contracts.patreasury.gov/>
  - State agency contracts of \$5,000 or more
- PennWATCH, <http://pennwatch.pa.gov/>
  - State employee names, titles, salaries & compensation
  - State agency employee counts
  - Basic state budget data



# **Common Exemptions Raised by Agencies**

## **Exemptions raised most often during appeals to OOR in 2018**

1. Noncriminal investigative, 708(b)(17)
2. Criminal investigative, 708(b)(16)
3. Internal, predecisional deliberations, 708(b)(10)
4. Personal identification information, 708(b)(6)
5. Public safety, 708(b)(2) & Personal security, 708(b)(1)

# Noncriminal Investigative Exemption

## Section 708(b)(17) allows agencies to withhold:

- Investigative materials, notes, correspondence & reports
- Identity of a confidential source
- Work papers underlying an audit
- Records that would reveal the institution, progress or result of an investigation, except:
  - Imposition of a fine or civil penalty
  - Suspension, modification or revocation of a license, permit, etc.
  - **Executed settlement agreement** (unless made confidential by a court)

# **Criminal Investigative Exemption**

## **Section 708(b)(16) allows agencies to withhold:**

- Investigative materials, notes, correspondence, videos & reports
- Identity of a confidential source
- Victim information
- Records that would:
  - Reveal the institution, progress or result of a criminal investigation except the filing of criminal charges;
  - Impair the ability to locate a defendant; or
  - Hinder an arrest, prosecution or conviction

# Criminal Investigative Exemption

## Section 708(b)(16) does NOT allow agencies to withhold:

- Private criminal complaints – these are **public**
  - Typically obtained from the county district attorney
- Police blotters – these are **public**
  - If you want police blotter information, use the term “police blotter”
  - Definition is in 18 Pa.C.S. § 9102: A “chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses”

# Police Policies & Training Records

## Policies & training records are often public, at least in part

- Police department policies
  - Including department-wide training requirements
  - Some policies may be redacted under 708(b)(1), (2) or (3)
- Individual officer training records may be available
  - *Bucks County Courier Times* (April 19, 2019): “A veteran New Hope police officer who shot and wounded a Pipersville man after confusing his stun gun with his Glock 22, had not been re-certified in the use of his police-issued Taser since at least 2016, according to a review of records obtained by this news organization.”

# Appealing Denials From a Local Law Enforcement Agency

## Certain appeals go to the local District Attorney:

- Section 503(d)(2): “The district attorney of a county shall designate one or more appeals officers to hear appeals ... relating to access to criminal investigative records ... of a local agency of that county”
  - This alternative appeal process only applies to denials based on 708(b)(16).
  - However: OOR always **transfers** such cases to the DA.
    - Appealing to OOR never hurts; sometimes OOR & DA have joint jurisdiction.
- OOR hears all cases involving Pennsylvania State Police

# Requesting Police Recordings

## RTKL does not apply to police recordings

- Act 22 of 2017 covers **police video & audio recordings**
- Requests must be submitted within **60 days of recording date**
  - *Requests must be submitted via certified mail or in person*
- Agency has 30 days to respond, may deny for various reasons
- Denials may be appealed within 30 days to court; \$125 fee
- Law enforcement agencies & DAs have fairly broad discretion to release a recording (with or without a written request)
- [More info on OOR website](#)

# 911 Recordings & Transcripts

## Section 708(b)(18) gives agencies discretion on 911 calls

- Call **recordings & transcripts** can be released *if* the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure
- **Time Response Logs** are **public**
  - “Time Response Log” not defined; at a minimum, location info should include closest cross street, block identifier or mile marker
  - Log should also include date, call time, dispatch time, responding unit, time of arrival on scene, release time & nature of the call



# Internal, Predecisional Deliberations

## Section 708(b)(10) allows agencies to withhold:

- The “internal, predecisional deliberations of an agency”
  - Must be internal to agency; and
  - Must be prior to a decision; and
  - Must be deliberative in nature
  - *Factual information (e.g., numerical data) cannot be withheld with this exemption – even if surrounding material must be redacted*
- Budget & legislative strategies

# Personal Identification Info Exemption

## Section 708(b)(6) allows agencies to withhold:

- Social Security number, driver's license number
- Personal financial information
- Personal telephone number & email address
  - Unless held out to the public
- Marital status, spouse's name, dependent info
- Home address of a judge or police officer

# Public Safety Exemption

## Section 708(b)(2) allows agencies to withhold:

- Records “reasonably likely to jeopardize or threaten public safety or preparedness”
- [2019-1265](#): Sought records related to surveillance cameras
  - Agency **cannot** withhold vendor names
  - Agency **cannot** withhold types of surveillance cameras purchased
  - Agency **can** withhold specific locations of the cameras

# Personal Security Exemption

## Section 708(b)(1) allows agencies to withhold:

- Records “reasonably likely to result in a substantial and demonstrable risk of physical harm to ... an individual.”
- [2019-0215](#): Request sought records related to ShotSpotter
  - Digital data incl. timestamps, locations, audio clips
  - Appeal granted in part, denied in part, transferred in part
  - Currently pending in Allegheny County Court of Common Pleas

## **Tip: Communicate with the Agency**

### **Good communication can prevent and solve many issues**

- Good practice to let agency know you're willing to talk
- Requesters often submit broad requests to ensure they get all the records they want
  - Understandable, but can be expensive & frustrating
  - Requesters don't want surprise bills
  - Agencies don't want unnecessary work
- Many agencies willing to discuss requests
- If agreement reached on revised request, **put it in writing**

## **Tip: Communicate with the Agency**

### **Reason for making RTKL request**

- Agency cannot require requester to provide reason for request
- They can ask, but requester can decline to answer
- However, requester may sometimes want to provide info
  - Can help agency understand request & speed response
  - Can help reduce number of valueless records received
  - Can reduce cost if hard copies must be made

# Appealing a RTKL Denial

## Most denials can be appealed to the OOR

- Denied requests can be appealed within **15 business days**
- Most appeals filed with the OOR
  - Not Attorney General, Auditor General, Treasurer, General Assembly
  - Not Courts (requests & appeals governed by Rule 509)
  - Denials from local agencies based on criminal investigatory records appealed to county DA (but PSP denials appealed to OOR)
- Can also appeal redactions (which are denials) & **fees**

# Appealing a RTKL Denial

## OOR appeal process designed to be simple

- File appeals using online form at OOR website
  - About 10 to 15 minutes to fill out
- Only need to complete the form – can make argument later
- No lawyer necessary
- OOR assigns Appeals Officer to oversee case
- Both sides can present evidence & argument
- OOR has **30 days** to issue Final Determination



# OOR – Online Appeal Form

## FILE AN APPEAL

### Requester

Name:

First Name

Last Name

Address:

Address 1

Address 2

City

Pennsylvania

x ▼

Zip

Contact:

Phone

Email

Agency:



▼

Type Agency Name if not in list

Agency Address:

Address 1

Address 2

City

Pennsylvania

x ▼

Zip

Agency Contact:

Phone

Email

# OOOR – Online Appeal Form

Records at Issue in this  
Appeal:

*(If you run out of space, you may attach a file with more details.)*

Request Submitted to  
Agency Via:

Dates:

Date of Request



Date of Response



☐ Check if no response


Agency Open Records  
Officer:

Name & Title of Person Who Denied Request (if available)

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

# OOR – Online Appeal Form

Attach Files:

 Browse ...

+ Add



Remove All

*Maximum file attachments: 10*

*Maximum file size: 10MB per attachment*

*Allowed file types: pdf, doc, docx, rtf, txt, xls, xlsx, jpg, png, gif, tiff*

*File names may not contain the following characters: \ / : \* ? " < > |*

- ☐ I have attached a copy of my request for records.
- ☐ I have attached a copy of all responses from the Agency regarding my request.
- ☐ I have attached any letters or notices extending the Agency's time to respond to my request.
- ☐ I hereby agree to permit the OOR an additional 30 days to issue a final determination.
- ☐ I am interested in resolving this issue through OOR mediation. *(This stays the initial OOR deadline for the issuance of a final determination by 7 business days. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.)*




I'm not a robot



Submit

Reset

Printable versions of this form (revised September 2019):  

## Tip: Consider Requesting Mediation

- RTKL authorizes OOR to establish **informal mediation program**
- Goal: Mutually agreeable settlement
- Voluntary & confidential
- Either side can end mediation at any time
  - If mediation ends, case moves to normal appeal process (new AO)
- OOR has trained mediators
- Can save time & expense

# Office of Open Records

## Created by RTKL: Independent & quasi-judicial

- Decide appeals filed by people denied access to records
- Provide RTKL & Sunshine Act training
- **20 total staff**
  - Executive Director & Deputy Director
  - 13 Attorneys (incl. 11 Appeals Officers)
  - Chief of Training & Outreach
  - 4 Administrative

# OOR Caseload

## Thousands of RTK appeals filed every year

- In 2018, OOR heard **2,229 appeals**
  - Three-year average: 2,255; Five-year average: 2,341
  - That's **appeals**, not **requests**
  - No central database of # of requests
    - LBFC Study (released 2018) estimated 109,000 requests received by state & local agencies, combined, in 2016
    - Thus, approximately 2.1% of requests are appealed to OOR
    - Our data indicates <10% of OOR decisions are appealed to court

# OOOR Resources

## Website, Twitter, Email Lists & More

- Web: <https://openrecords.pa.gov/>
- Blog: <https://openrecordspennsylvania.com/>
- Email lists: Daily Digest of FDs & General Updates
  - <https://www.openrecords.pa.gov/EmailSubscriptions.cfm>
- Twitter: [@OpenRecordsPA](#)
  - Executive Director: [@ErikOpenRecords](#)
- [YouTube Channel](#)
- Open Records in PA Podcast: [Apple Podcasts](#), [Stitcher](#), etc.