

Understanding Pennsylvania's Open Records Law

A guide to compliance with
the Right-to-Know Law

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Right-to-Know Law 65 P.S. § §67.101, *et. seq.*


- Written by Senate Majority Leader
Dominic Pileggi (R-Delaware)
- Signed into Law February 14, 2008
- **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)

WHO is subject to the RTKL?

- Commonwealth Agencies
 - Any office, department, authority, board, multistate agency or commission of the executive branch; an independent agency; and a State-affiliated agency including the Governor's office, the Office of Attorney General, the Department of the Auditor General and the Treasury Department.
 - An organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function.
- Local Agencies
 - Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school
 - Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.
- Legislative Agencies
- Judicial Agencies

Agency obligations:


- Must designate an official or employee to act as the 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



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Agency obligations (cont.)

- Must post the following (at agency **and on internet** (if agency maintains 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.




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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.
3. You may ask Why?, but you cannot deny based on why the Requester wants the records.



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WHAT is covered by the RTKL?

Every "record" of an agency is subject to the RTKL.
This does not mean every record of an agency is public.
It means every record is subject to being requested and is *presumed public* unless an exemption or other provision of the RTKL permits an agency to withhold it.

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." 65. P.S. §67.102

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"Any information regardless of its physical form..."

This includes audio and video recordings, maps, surveys, emails, texts, instant messages, etc.



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Who can make Requests?


- Any person that is a legal resident of the United States. (This could change, stay tuned)
- The term person includes agencies and corporate entities, not just humans.




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Receiving Requests

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




Agency Open Records Officer
Best Borough
10 Main Street
Agencysville, PA 12345



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What is a proper Request?

- A request for records ~~should~~ **MUST** be ***addressed*** to the AORO; 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.




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Receiving a Request.

- Upon receipt, the AORO shall:
 - note the date of receipt (by the AORO) 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.

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 **RECEIVED**
SEP - 4 2015
MAIL ROOM

STANDARD RIGHT-TO-KNOW REQUEST FORM

DATE REQUESTED: 8/6/15
REQUEST SUBMITTED BY: E-MAIL ☒ U.S. MAIL ☐ FAX ☐ IN-PERSON ☐
NAME OF REQUESTOR: Galley Terrace / B.N. Quist
STREET ADDRESS: 663 Parkway Ave. Harrisburg, PA 17122
CITY/STATE/COUNTY (Required): Harrisburg, Pa 17122
TELEPHONE (Optional):
RECORDS REQUESTED: Written Subpoena A Subpoena Order for Subpoena Information:
*Provide as much specific detail as possible so the agency can identify the information.
DO YOU WANT COPIES? ☒ YES ☐ NO
DO YOU WANT TO INSPECT THE RECORDS? ☒ YES ☐ NO
DO YOU WANT CERTIFIED COPIES OF RECORDS? ☒ YES ☐ NO
RIGHT TO KNOW OFFICER:
DATE RECEIVED BY THE AGENCY:
AGENCY FIVE (5)-DAY RESPONSE DUE:

**Public bodies may file anonymous verbal or written requests. If the requestor wishes to pursue the request and remedies provided for in this Act, the request must be in writing. (Section 702)
Written requests must include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703)


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Some agencies date stamp and assign a RTKL tracking number

Other agencies note the dates on the bottom of the form. Either method is satisfactory.

Make responding easier

- Train employees to immediately forward RTKL requests to the AORO.
- Create a form for responding.
- Put commonly requested records on your website.
- Practice proper records management in accord with the Pennsylvania Historic and Museum Commission retention schedules.



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NOTICE (of Request) TO THIRD PARTIES

- Trade Secret or Confidential 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
 - OOR recommendation
 - Public school employees

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POSSESSION: 3rd 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 to perform a governmental function and
- b) 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)

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Agency Response

- Agency AORO must SEND the written response to a request within 5 (agency) business days.

- A mailed response is not required to be RECEIVED within five (5) business days.

- Response Options:

- Deny
- Extend
- Grant



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Extensions – Section 902

- Section 902 permits an agency to extend the time to respond without the Requester's approval:
 - Maximum extension is 30 CALENDAR days.
 - Agency is required to state the reason for the extension
 - Must send extension letter within the 5 business day response period.
- Extension beyond 30 calendar days requires written confirmation of approval (by Requester) prior to the expiration of the original extension.

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Granting Access


- If no exemptions or other grounds exist to deny access, the agency must respond granting access to the records.
- The agency may request payment of copy fees prior to access.
 - Simultaneous exchange at agency office
 - Receipt of payment in mail
- May refer requester to agency website in lieu of making copies
 - (See 65 P.S. Section 67.704)
- May allow Requester to use their own equipment to make copies (e.g. scanner, camera, copier)



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Fees – ~~\$~~Section 1307


- The OOR fee schedule does not permit an agency to charge for redaction or labor time to respond to the request
- OOR established maximum fee schedule is available on the OOR website
- The maximum fee for a standard 8 1/2 x 11, black and white copy, is \$0.25 per page



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Fees – ~~\$~~Section 1307 (cont.)

- No fee for records which exist electronically unless printing is required in order to redact information.
- Postage fees may not exceed actual cost via standard mail, unless requester asks for a different method.
- Prior to processing* the Request, an Agency may require pre-payment if the fees are expected to exceed \$100.



* fee estimate must be provided within five business days as part of a notice that the agency is taking a 30 day extension to respond.

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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.



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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.



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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

This is not an easy test to meet.

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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.



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Section 708(b) Exemptions (simplified to main subject only)

- | | |
|---|--|
| <ol style="list-style-type: none"> 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; <i>does not exempt</i> name, salary of public employee; 7. Employee records | <ol style="list-style-type: none"> 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 |
|---|--|

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Section 708(b) Exemptions (simplified to subject, cont.)

- | | |
|---|--|
| <ol style="list-style-type: none"> 17. Records related to a noncriminal investigation 18. 911 records 19. DNA and RNA records 20. Autopsy records except name and cause and manner of death 21. Draft meeting minutes (but not audio recordings) 22. Appraisals prior to decision to proceed with project 23. Library and archives | <ol style="list-style-type: none"> 24. Rare documents 25. Archeological site 26. Proposals and bids 27. Correspondence with insurance carrier 28. Social services records 29. Correspondence between an individual and a member of the General Assembly 30. Record identifying the name, home address, date of birth of a minor |
|---|--|

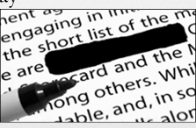
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Redacting Records

If a record contains information subject to access, as well as exempt (non-public) information, the agency must provide the public information, but may redact the information that is not public.

65 P.S. Section 67.706

You must provide the legal and factual basis for the redaction.
You may not charge a fee for redacting records.




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Special Records


Financial Records

- The exemptions in Section 708(b) DO NOT APPLY to financial records, except an agency may redact information protected by 708(b)(1), (2), (3), (4), (5), (6) or (17).
 - 65 P.S. Section 67.708(c)



Aggregated data


- The exemptions in Section 708(b) DO NOT APPLY to aggregated data, maintained or received by an agency, except data protected by 708(b)(1), (2), (3), (4) or (5).
 - 65 P.S. Section 67.708(d)



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Filing an Appeal

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



Is it a Proper Appeal?

- Appeals must 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 COULD RESULT IN DISMISSAL

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OOR Docketing Letter

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.

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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.


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Appeal Options: *In Camera* Review

- *In Camera* review is a process where the agency provides the 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.

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More Appeal Options

OOR Hearing	Resolution between parties
<ul style="list-style-type: none"> • Either party may request a hearing. • The decision to hold or not hold a hearing is not appealable. • An extension of time to issue the final determination is required to hold a hearing. 	<ul style="list-style-type: none"> • Parties are encouraged to contact each other and attempt to resolve the dispute (both prior to the appeal and during the appeal process). 

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Final Determinations

- Are issued within 30 days of receipt of an appeal unless Requester agrees to an extension.
- Are legally binding final orders.
- May be appealed to the local Court of Common Pleas (local agency) or Commonwealth Court (Commonwealth agency) within thirty (30) days of issuance of the final determination.
- OOR must be given notice of an appeal of its final determination. 65 P.S. Section 67.1303.

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Petition for Reconsideration

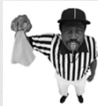
- The OOR accepts Petitions for Reconsideration (PFR) of its Final Determinations if such Petition is filed within 15 days after the issuance of a Final Determination.
- The application must be made by petition, stating specifically the grounds relied upon, and served upon the other party.
- A PFR does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

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

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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.



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QUESTIONS?

- The OOR does answer general questions if there is no related pending appeal.
65 P.S. §67.1310
- If you are unsure how to respond to a Request or an appeal contact your solicitor for legal advice.
- For additional information visit <http://openrecords.state.pa.us>



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