

The Right to Know Law  
and  
Recent case law

# 16 cases from the Supreme Court, Commonwealth Court and Courts of Common Pleas

- Requests and responses
- Records
- Judicial practice after disclosure ordered
- OOR practice

*Office of the Governor v. Engelkemier,*  
\_\_\_ A.3d. \_\_\_, 2016 Pa. Commw. LEXIS 436

- Request sought all e-mails of former Chief of Staff McGinty for a 5 ½ month period.
- The Governor’s Office asked the requester to be more specific, and the requester provided 109 keywords, including specific and general phrases, i.e., “liquor privatization” and “Tom Wolf.”
- Based on the 109 keywords, the parties agreed to a “rolling production schedule.”

*Office of the Governor v. Engelkemier*,  
\_\_\_ A.3d. \_\_\_, 2016 Pa. Commw. LEXIS 436

- On appeal to the OOR and Commonwealth Court, the Governor's Office argued the request was insufficiently specific.
- Applying the 3 part balancing test for specificity, i.e., time, scope of documents, and subject matter, the court concluded that the request was sufficiently specific.
- Limited time frame and defined scope of records.

*Office of the Governor v. Engelkemier*,  
\_\_\_ A.3d. \_\_\_, 2016 Pa. Commw. LEXIS 436

- With respect to the “subject matter” portion of the test, the Court noted that a keyword list is “not necessarily a substitute for a properly-defined subject matter[.]”
- However, the court noted that the Governor’s Office’s action in securing the rolling production schedule showed that the Governor’s Office “had sufficient information upon which it could fully process [the] request[.]”

*PFUR v. Dep't of State,*  
138 A.3d 727 (Pa. Commw. Ct. 2016)

- Request sought voter information, and the Department denied on the basis that the requester did not comply with the Voter Registration Act.
- The OOR denied the appeal, holding that the requester was required to comply with the VRA.
- Commonwealth Court agreed, holding that Section 3101.1 of the RTKL mandates the use of alternate access requirements if they conflict with the RTKL. Found that the VRA conflicted with the RTKL, and, therefore, the requester was required to comply with the VRA.

*Dep't of Educ. v. Bagwell,*  
131 A.3d 638 (Pa. Commw. Ct. 2016)

- Request sought records regarding the Sandusky investigation.
- The Department extended its time to respond by thirty days, and, on the last day to respond, demanded prepayment of fees prior to reviewing the records and asserting exemptions.
- The OOR held that the Department could not demand prepayment after the initial 5 day period, and ordered disclosure.

*Dep't of Educ. v. Bagwell,*  
131 A.3d 638 (Pa. Commw. Ct. 2016)

- On appeal, the Commonwealth Court held agencies were *not* required to demand prepayment within the initial 5 day response period.
- The Court also held that agencies could *not* use a prepayment demand to reserve raising grounds for withholding or redacting records. Grounds for withholding records must be made during the statutory response periods.
- In calculating the prepayment fee, agencies may only charge for records to which access is being granted.

*Public Utility Comm'n v. Seder,*

139 A.3d 165 (Pa. 2016)

- Request sought a “tip letter” and settlement agreement regarding a utility company violation.
- The PUC denied the request under the Public Utility Code on the basis that only records relied on by the “Commission” are subject to public disclosure. Records of “Commission staff” are not subject to the Code’s disclosure requirements.

*Public Utility Comm'n v. Seder,*  
139 A.3d 165 (Pa. 2016)

- Relying on principles of statutory construction and public policy considerations of transparency regarding utility settlement agreements, the Court concluded that the Code's public disclosure requirements applied to records both of the Commission and PUC staff.

*Dep't of Pub. Welfare v. Eiseman,*  
125 A.3d 19 (Pa. 2015)

- Request sought, among other items, the rates Medicaid insurance companies paid to insurance subcontractors, who argued this information were trade secrets.
- Relying on a prior Supreme Court case, the OOR concluded that even though these rates were not direct payments from the government, they were financial records and not protected under the RTKL, and the Uniform Trade Secrets Act did not apply.
- The Commonwealth Court reversed and held that payments from government contractors to subcontractors were not government “financial records” and the Uniform Trade Secret Act applied to protect the records.

*Dep't of Pub. Welfare v. Eiseman,*  
125 A.3d 19 (Pa. 2015)

- The Supreme Court reversed and held that the subcontractor payment rates were government “financial records” due to the unique nature of the Medicaid program and the requirement of the government to approve subcontractor payment rates.
- The Supreme Court also reversed and held that the Uniform Trade Secrets Act did not apply because of the trade secrets exemption contained in the RTKL.

*Dental Benefit Providers, et al. v. Eiseman,*  
*124 A.3d 1214 (Pa. 2015)*

- Request sought subcontractor payment rates to medical services providers.
- The Commonwealth Court held and the Supreme Court agreed that records of payments between a subcontractor and medical services providers were not subject to public disclosure because there was no contractual relationship with the government.

*Global Tel\*Link v. Wright*,  
\_\_\_A.3d. \_\_\_, 2016 Pa. Commw. LEXIS 405

- Request sought DOC contracts for inmate telephone services.
- DOC granted access but redacted vendor financial information, arguing the information was exempt under Section 708(b)(26).
- The OOR concluded that a contract is a financial record which cannot be redacted under Section 708(b)(26).

*Global Tel\*Link v. Wright,*

\_\_\_A.3d. \_\_\_, 2016 Pa. Commw. LEXIS 405

- The Commonwealth Court overturned the OOR, holding that merely because information is attached to a contract doesn't render the information a "financial record."
- Because the vendor financial information did not deal with the receipt or disbursement of agency funds, but rather with the vendor financial capability to perform the contract, the information was not a "financial record" under the RTKL and was exempt from disclosure under Section 708(b)(26).

*PFUR v. Office of Administration,*  
129 A.3d 1246 (Pa. Commw. Ct. 2015)

- Request sought records showing Union PAC contributions from identified state employees.
- The OOR denied the appeal because disclosure of names and any political contributions would violate employees' First Amendment right to freedom of association.
- The Commonwealth Court agreed and held that there is no overriding state interest in requiring the disclosure of the names of individual employees *and* their political associations. May require disclosure of amounts and recipients if the contributor is not identified.

*City of Harrisburg v. Hockeimer,*  
No. 2015-CV-9102 (Dauphin C.C.P. 2016) *appeal*  
*pending* No. 579 C.D. 2016 (Pa. Commw. Ct.)

- Request sought various records regarding activities of the City of Harrisburg under former Mayor Stephen Reed.
- The City denied the request, arguing that the records were under Grand Jury subpoena, and, therefore, confidential under the Investigating Grand Jury Act.
- On appeal to the OOR, the OOR concluded, based on an analysis of federal law, that records which are created or exist *independently* of grand jury proceedings are not “matters occurring before the grand jury,” and, therefore are *not confidential*.

*City of Harrisburg v. Hockeimer*,  
No. 2015-CV-9102 (Dauphin C.C.P. 2016) *appeal*  
*pending* No. 579 C.D. 2016 (Pa. Commw. Ct.)

- On appeal to the Dauphin County Court of Common Pleas, the Court affirmed the OOR, stating: “We are satisfied that the OOR’s determination and analysis are appropriate. We reach this conclusion not only because there is no legal authority to the contrary, but because the result is grounded in common sense.”

*Dep't Pub. Welfare v. Eiseman,*

No. 1935 C.D. 2012, 2016 Pa. Commw. LEXIS 334  
(Unreported)

- Petition to hold DHS in contempt for failure to comply with a court order mandating disclosure of records.
- DHS did not provide payment amounts made by Medicaid insurers to medical service providers. DHS *did* provide payment amounts made by Medicaid insurers to insurance subcontractors.
- The Commonwealth Court concluded that DHS had no valid basis to distinguish between payments made to insurance subcontractors and payments made to medical service providers and held DHS in civil contempt.

*In re: Appeal of Philadelphia District Attorney,*  
2016 Phila. Ct. Com. Pl. LEXIS 55, *appeal pending*  
No.2627 C.D. 2015 (Pa. Commw. Ct.)

- Request sought various e-mails of the DA's Office.
- The DA denied access because the requester was the subject of a court order prohibiting discovery in litigation.
- On appeal to the OOR, the OOR granted access holding that litigants are not prohibited from accessing records under the RTKL.

*In re: Appeal of Philadelphia District Attorney,*  
2016 Phila. Ct. Com. Pl. LEXIS 55, *appeal pending*  
No.2627 C.D. 2015 (Pa. Commw. Ct.)

- Philadelphia Court of Common Pleas upheld the OOR holding that Commonwealth Court had expressly ruled that litigants are *not* precluded from accessing records under the RTKL.
- The Court imposed a civil fine of \$500, finding that the DA's denial of access was in bad faith based on existing case law.

*Wishnefsky v. Dep't of Corr.*,  
144 A.3d 290 (Pa. Commw. Ct. 2016)

- Request sought invoices for a medical device purchased for an inmate.
- The Department denied, interpreting the request as a question.
- On appeal to the OOR, the Department raised new grounds for denial, specifically that it did not possess the records.
- Based on the Department's affidavit the OOR denied the appeal.
- On appeal to the Commonwealth Court, the Court held that the OOR should have allowed the requester to respond to the agency's new grounds for denial.

*Worcester Twp. v. Office of Open Records,*  
129 A.3d 44 (Pa. Commw. Ct. 2016)

- Request sought agency e-mails regarding a development project.
- The township denied access, arguing the records were exempt under the RTKL.
- On appeal to the OOR, the OOR ordered the township to produce the records for *in camera* review and provide a privilege log.
- The township refused to submit the records to the OOR and the dispute was heard by a county court of common pleas and then the Commonwealth Court.
- The township argued that *in camera* review was unwarranted and the evidence was sufficient to permit the OOR to issue a decision.

*Worcester Twp. v. Office of Open Records,*  
129 A.3d 44 (Pa. Commw. Ct. 2016)

- The trial court held that *in camera* review wasn't warranted and that the OOR had evidence which it was free to believe or disbelieve and issue a decision either for or against the township.
- The Commonwealth Court held that an appeals officer has an obligation to develop an adequate evidentiary record, and had "broad discretion" as to how best to develop the evidentiary record, including ordering *in camera* review. Upheld OOR's *in camera* order.

*Office of Open Records v. Pa. State Police*,  
\_\_\_ A.3d \_\_\_, 2016 Pa. Commw. LEXIS 422 (2016)

- Requests sought casino video surveillance footage and PSP dash-cam footage.
- The OOR ordered *in camera* review, and filed a petition to enforce when PSP refused.
- The Commonwealth Court held, with respect to the video surveillance footage, CHRIA prohibited a non-judicial agency from viewing records involving a criminal investigation. Denied *in camera* review.
- The Court stayed a decision on the PSP dash-cam footage pending the Supreme Court's decision in *Grove*.

*PASSHE. v. APSCUF,*  
142 A.3d 1023 (Pa. Commw. Ct. 2016)

- The request sought various budget and financial records from all 14 State Universities, and the Universities argued the requests were not sufficiently specific.
- On appeal to the OOR, the Universities again argued that the requests were not sufficiently specific, but that they may implicate 1.87 million pages of records. The OOR found the request sufficiently specific and ordered disclosure.
- On appeal to the Commonwealth Court, the Court found the requests to be sufficiently specific, but also noted that given the large volume of records, the agencies should have been given additional time to review the records and assert any exemptions.

*PASSHE. v. APSCUF,*  
142 A.3d 1023 (Pa. Commw. Ct. 2016)

- “[J]ust because an agency claims that it neither has the time nor resources to conduct a document-by-document review within the time period required by the RTKL does not make it so. The agency making the claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charge with reviewing the request require to conduct this review, and if the request involves documents in an electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. *Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.*

*PASSHE. v. APSCUF*,  
142 A.3d 1023 (Pa. Commw. Ct. 2016)

- The OOR has an implied power to unilaterally extend the final determination due date in appropriate circumstances.
- The OOR does *not* have the authority to grant agencies additional time to respond to a request before an appeal is filed with the OOR.

*PSEA, et al. v. Office of Open Records,*  
\_\_\_ A.3d \_\_\_, 2016 Pa. LEXIS 2337

- Case brought in 2009 to prohibit the disclosure of public school employee home addresses.
- Plaintiffs argued that home addresses were protected by a constitutional right to privacy.
- Disclosure subject to a “balancing test” used under the former Right-to-Know Act.
- Whether public’s interest in disclosure outweighed a person’s privacy interest.

*PSEA, et al. v. Office of Open Records,*  
\_\_\_ A.3d \_\_\_, 2016 Pa. LEXIS 2337

- The OOR argued that the “balancing test” was eliminated in the new Right-to-Know Law, and that there was no constitutional right to privacy in one’s home address.
- Commonwealth Court agreed, relying on its decision in *Mohn* and *Raffle* that one cannot have a reasonable expectation of privacy in one’s home address.

*PSEA, et al. v. Office of Open Records,*  
\_\_\_ A.3d \_\_\_, 2016 Pa. LEXIS 2337

- The Pennsylvania Supreme Court ruled that individuals have an right to “informational privacy” under Article 1, Sec. 1 of the Pennsylvania Constitution, including a right to privacy in one’s home address.
- Applying the “balancing test,” the Court could not find any public interest in disclosure of a home address that outweighed “the constitutional rights of the citizens of this Commonwealth to be left alone[.]”

*PSEA, et al. v. Office of Open Records,*  
\_\_\_ A.3d \_\_\_, 2016 Pa. LEXIS 2337

- The Court also express strong concerns about the releasing personal information without providing individuals with due process, i.e., notice and the opportunity to object to disclosure.
- Implications for the future of the RTKL.