



# pennsylvania

OFFICE OF OPEN RECORDS

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## **Mercer County**

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# Pennsylvania's Right-to-Know Law

## All government records (state & local) presumed to be public

- RTKL went into effect Jan. 1, 2009
- Flipped the presumption of openness
- Created the Office of Open Records to handle RTKL appeals
  - Independent, quasi-judicial
  - Approx. 2,500 appeals per year
  - Final Determinations carry the weight of law
  - Receives approx. 900 RTK requests every year (most misdirected)

# 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”
- *PA Office of Attorney General v. Philadelphia Inquirer*
  - Personal communications, even if they violate agency policies, are not “records” under the RTKL

# What is a Record?

## A record can be...

- Paper
- Emails
- Phone records
- Text messages
- Audio or video recordings
  - Security camera footage
- Social media

# 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 agency & personal email accounts)
  - Practical issues re: accessing personal devices & email
  - Best practice: Agency business done on agency devices & email
- Bottom line: Is it a **record**? And if so, is it a **public record**?

# When is a Record “Public” Under the RTKL?

## RTKL & other laws determine whether a record is public

- 30 exceptions in the RTKL allow agencies to withhold records
  - Fewer apply to financial records & aggregated data
- Exceptions in other laws & regulations
  - Other laws also make records expressly public (e.g., Coroner’s Act)
- Attorney-client privilege & other privileges
  - Only if recognized by PA courts; not “self-critical evaluation”
- Records can be made non-public by court order

# 30 Exemptions in the RTKL

1. Personal security
2. Public safety
3. Infrastructure security
4. Computer security
5. Medical records
6. Personal identification information; home address of law enforcement officers & judges; *does not exempt* name and salary of public employee;
7. Employee records
8. Labor negotiations
9. Draft records
10. Internal, 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

## 30 Exemptions in the RTKL

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

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

# Presumption of Openness

All government records (state & local) presumed to be public

- **Every** record is presumed to be public
- If an agency wants to withhold a record, the agency bears burden to prove it's not public

# Possession of a Record

## RTKL considers possession & constructive possession

- Third-party (contractor) records
- Copyrighted records
  - Inspection of the records is still allowed
- RTKL does not address records retention
  - If you have a RTKL request, treat it just like a litigation hold

# Third-Party (Contractor) Records

## Records held by a contractor may be subject to access if:

- The record is in the possession of a party with whom the agency has contracted to perform a governmental function
- The record is not exempt under RTKL
- *When appropriate, AORO should consult with contractor to determine whether any responsive records are held by contractor*

# Third-Party Notification

## Agency sometimes **required** to notify third parties

- An agency shall notify a third party of a request 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
  - State constitution includes a right to privacy
  - Balancing test: benefit of disclosure vs. right to privacy

# Receiving RTKL Requests

## RTKL **requires** agencies to accept OOR's Standard Request Form

- Agency may also create its own Request Form
- Any legal resident of the U.S. can submit a request
- Requests should seek records, not ask questions
  - E.g., “Why did the county give the contract to Acme Lumber?”  
vs. “How much did County Employee X make in 2017?”
- Requests should be specific
  - Three-part test done on a case-by-case basis
  - Subject, Scope & Timeframe

# Specificity: Examples

## Commonwealth Court cases on specificity:

- *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*
  - Can **not** seek **all emails** of a public employee **over 1 year**
- *Dep't of Env'tl. Prot. v. Legere:*
  - Seeking **4 years** of “Section 208” letters **is allowed**
  - Agency’s organizational decisions not held against requester
- *Dep't of Corr. v. St. Hilaire:*
  - “All records” for **5 years** documenting injuries & deaths **is allowed**

# RTKL is **NOT** a Confidentiality Law

## Records can be released even if RTKL allows non-disclosure

- An agency may exercise its discretion to make any otherwise exempt record accessible if:
  - Disclosure is not prohibited by federal or state law or regulation;
  - The record is not protected by privilege; and
  - The agency head determines that public interest favoring access outweighs any interest favoring withholding
- Example: 911 recordings

# Agency Open Records Officer Duties

## Upon receipt of a request, AORO is required to:

- Note the date of receipt on the written request
- Compute the date on which the initial response period will expire and note that date on the written request
  - 5 agency business days
- Maintain a copy of the Request until RTKL process is complete

# Responding to a RTKL Request

## RTKL includes very specific deadlines

- Initial (can be final) response: **5 agency business days**
  - Mailed responses not required to be RECEIVED within 5 business days, but must be sent within that time frame
- **30 calendar day extension** is possible
  - Must be taken within initial 5-day period
  - Section 902 of RTKL lists allowable reasons
  - Final due date *always* 5 business days + 30 calendar days
  - Only the requester can agree to further extensions

# Denying Access to Records

## An agency's denial must be in writing and must include:

- A description of the requested record;
- The legal and factual grounds for denial;
- AORO information;
- Date of response; and
- The procedure to file an appeal with the applicable appeals office (almost always the OOR)

# Agency Response: Costs & Format

## OOB fee schedule developed pursuant to RTKL

- General rule: No charge for electronic records
  - Redactions may necessitate printing electronic records
- Up to **\$0.25/page** for hard copies (8.5 x 11, b&w)
  - Cannot charge for labor, redaction, or legal review
- Requesters can photograph records
  - Can also use their own equipment to make copies
- Agencies required to provide records in medium requested (electronic vs. hard copy), do not have to create a record

# More About RTKL Fee & Payment Issues

## Working with requesters can save time & aggravation

- **No surprises!**
  - *Contact the requester with an estimate before the work starts*
- Contemporaneous exchange, but **payment is due first**
- Agency may require pre-payment for fees > \$100
- Hold responses for 60 days before discard if not picked up
- May deny requests for non-payment of previous requests

# District Attorneys & the RTKL

## District Attorneys play a unique role under the RTKL

- DAs are not judicial agencies – they are local agencies
- DA records can be requested just like any other local agency
- What's unique:
  - DAs hear appeals involving local criminal investigative records
  - Some requests sent to local PDs will be appealed to the DA
  - If appeal is misfiled with OOR, we transfer to the DA
  - Sometimes, the OOR and the DA have concurrent jurisdiction

# When a Denial is Appealed

## The appeal process also has tight deadlines

- Denials must be appealed within 15 (OOR) business days
- Appeal assigned to an OOR Appeals Officer
- OOR sends docketing letter to AORO & requester
  - *Be sure the OOR has current AORO contact information!*
- OOR has **30 calendar days** to issue a Final Determination
  - Agency generally has **7 business days** to submit evidence & argument
  - Can seek additional time, but... 30-day deadline is looming

# Presenting Evidence to OOR

## Evidence generally comes in the form of an affidavit

- Sample affidavits for common situations on OOR website
- **Must be sworn to under penalty of perjury**
  - Affidavits do not need to be notarized
- All communications must be sent to OOR & other party
- Feel free to ask the Appeals Officer questions

# OOR Final Determinations

## All Final Determinations issued by the OOR are:

- Issued within 30 days
  - Unless requester agrees to an extension
- Legally binding final orders
- Available for review on OOR website, Lexis & Westlaw

# ***In Camera* Review of Records**

## **Either party can request; OOR may order *in camera* review**

- Agency sends unredacted copy of record(s) to Appeals Officer
- Appeals Officer reviews records to determine whether the asserted exemption applies
- Requester never sees *in camera* submissions

# OOR Mediation Program

RTKL authorizes OOR to establish a **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

# Judicial Review of RTKL Cases

## Either party can appeal an OOR decision

- 30 calendar day deadline to file w/ appropriate court
- Local agency appeals go to Court of Common Pleas
- OOR must be served notice, but is **NOT** a party to appeal
- OOR posts all public appeal documents on website

# Penalties & Attorney's Fees

## Section 1304 gives courts power to impose sanctions

- If a court finds that records were denied based on an unreasonable interpretation of law, or in bad faith, an agency can be required to pay attorneys' fees
- Berks County Court of Common Pleas: **\$12,071** (August 2018)
- Commonwealth Court: **\$118,458** (October 2018)
- Judges are taking the RTKL very seriously

# Best Practices

## Experience has taught us that agencies are smart to:

- Adopt an Open Records Policy (sample on OOR website)
- Appoint an alternate AORO
- Issue agency email accounts & phones
- Use its website to post as many records as possible
  - Can post RTKL requests & responses
- Develop a records retention policy... and follow it

# Potential Amendments to the RTKL

## Bills introduced, consensus developed on numerous issues:

- New fees for commercial requests
  - Does not include the media
- Inmate requests limited to certain categories of records
- Courts can fine agencies \$500/day for ignoring an OOR order

# OOOR Resources

## Website, Twitter, Email Lists & More

- Web: <https://openrecords.pa.gov>
  - 80-page AORO Guidebook (28 pages plus 52 pages of exhibits)
  - Agency guides, incl. law enforcement agencies
  - Sample policies, grant letters, denial letters, affidavits, etc.
- Blog: <https://openrecordspennsylvania.com>
  - Updates on RTKL issues
  - Presentations given by Executive Director

# OOOR Resources

## Email Lists, Twitter & More

- Email lists: Daily Digest of FDs & General Updates
  - <https://www.openrecords.pa.gov/EmailSubscriptions.cfm>
- Twitter: @OpenRecordsPA
  - Executive Director: @ErikOpenRecords
- YouTube Channel
- Webinars (sign up for email general update list to be notified)
- Open Records in PA Podcast: Apple Podcasts, Stitcher, etc.
- 717-346-9903