



**pennsylvania**

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

## **Right-to-Know Law w/ Sen. Michele Brooks**

*April 3, 2019*

<https://openrecords.pa.gov>

[@ErikOpenRecords](#)

[@OpenRecordsPA](#)

[earneson@pa.gov](mailto:earneson@pa.gov)

(717) 346-9903

# Right-to-Know Law Basics

## The most basic of basics

- RTKL allows people to **request state & local gov't records**
- Agencies must respond within **5 business days**
- Can grant the request, deny it, or a combination of both
  - Can sometimes extend deadline to reply by 30 calendar days
- If any portion is denied, requester can appeal to OOR
- OOR decides cases in 30 days (requester can grant more time)
- Either side can appeal OOR decision to court (**<10% of cases**)

# 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
- Attorney-client privilege & other privileges
  - Only if recognized by PA courts; not “self-critical evaluation”
- Records can be made non-public by court order

# 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* (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 agency & personal email accounts)
- All that matters: Is it a **record**? And if so, is it a **public record**?

# Receiving RTKL Requests

## Agencies may see requests submitted in various ways

- OOR Standard RTKL Request Form
- The agency's own RTKL Request Form
- Email, letter, etc.
  - Agencies can adopt a policy to require the use of a form
  - Always must accept the OOR Standard RTKL Request Form

# Standard RTKL Request Form

## OOR Standard RTKL 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.*

# Standard RTKL Request Form

## OOR Standard RTKL 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. 5, 2018



# Receiving RTKL Requests

## Not everything has to be a formal RTKL request

- **Use common sense**
- What will be most efficient? What will take the least time?
- Post commonly requested records on website
- Little (or no) reason to require RTKL request for simple records

# Receiving RTKL Requests

The Agency Open Records Officer (AORO) is **VITAL**

- AORO receives all requests
- AORO serves as main point of contact for requesters
- AORO contacts other agency personnel who may have records
- AORO tracks deadlines for responses and appeals
- AORO, when necessary, consults with agency head
- AORO, when necessary, consults with agency solicitor

# Best Practices

## Experience shows agencies handle RTKL requests best when:

- AORO receives RTKL training
  - Other staff may also benefit from training
- Alternate AORO is available when AORO is out of office
- Agency work is done on agency devices & email accounts
- A good record retention policy is in place ... and followed.

# Responding to RTKL Requests

## RTKL is not a confidentiality statute

- None of the exemptions MUST be claimed
- Again: **Use common sense**
- Records can be released outside of the RTKL
- An agency may exercise its discretion to make any otherwise exempt record accessible if:
  - Disclosure is not prohibited by law or regulation; and
  - The record is not protected by privilege; and
  - The agency head determines that public interest favoring access outweighs any interest favoring withholding.

# Responding to RTKL Requests

## What agencies must do (part 1)

- Conduct a good faith search for records
  - Advise all custodians of potentially responsive records about the request
  - Obtain all potentially responsive records from those in possession
  - Review responsive records & assess their public nature
  - Search must be reasonably calculated to find all responsive records

# Responding to RTKL Requests

## What agencies must do (part 2)

- Contact relevant third-party contractors for responsive records
- Maintain all responsive records through all appeals
- Consider the constitutional right to privacy
  - *PSEA v. OOR*, focused on home address but has broader application

# Responding to RTKL Requests

## What agencies are not required to do

- Do not have to create a record that doesn't exist
- Do not have to conduct legal research
  - “What law gives you the authority to do this thing I don't like?”
- Do not have to create electronic copies if only hard copies exist
- But... it might make sense to do any or all of these
  - Again: **What is most efficient?**

# Responding to RTKL Requests

## Copyrighted records

- Agency may hold records copyrighted by a third party
- Copyright Act does not exempt records under the RTKL
- It does, however, limit the type of access
- Copyrighted records may be inspected, even if they cannot be duplicated
- “Absence of consent ... to duplication ... should be presumed.”
  - *Ali v. Philadelphia City Planning Commission*



# Police Recordings

## RTKL does not apply

- Act 22 of 2017 covers **police video & audio recordings**
- 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

# Tip: Communicate with the Requester

## Good communication can prevent and solve many issues

- 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 requesters willing to discuss requests
  - Cannot require requester to provide reason for request
- If agreement reached on revised request, put it in writing

# Fees Under the RTKL

## OOR fee schedule developed pursuant to RTKL

- Only required to provide records in existing format
- Up to **\$0.25/page** for hard copies (8.5 x 11)
- No charge for electronic records
  - Redactions may necessitate printing electronic records
- Requesters who seek to inspect records can photograph them
- Cannot charge for labor or legal review
- OOR fee schedule (on website) goes into greater detail

# 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; and
- Explain how to appeal the denial
- NOTE: Failure to respond by the statutory deadline is a “deemed denial” & can be appealed

# Appealing a RTKL Denial

## Most denials can be appealed to the OOR

- If request is denied, appeal can be filed 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

- Requester can file appeals w/ online form at OOR website
  - About 10 to 15 minutes to fill out
- 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 Mediation Program

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 received **2,229 appeals**
  - That's total appeals, not total requests
  - No central database of # of requests
    - LBFC Study (released 2018) estimated 109,000 requests received by state & local agencies, combined, in 2016
    - Anecdotal evidence suggest that has remained fairly steady

# 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.